IN THE SUPREME COURT

STATE OF MICHIGAN

Appealed from the Michigan Court of Appeals

ROBERT LITTLE and BARBARA LITTLE,

Plaintiffs/Appellants,

v

STEVEN KIN, ROSALYN KIN, THOMAS TRIVAN, and DARLENE TRIVAN,

Defendants/Appellees.

_____/

Supreme Court No. 121037

Court of Appeals No. 220894

Lower Court Case No. 98-006136-CZ

PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF THE POSITION OF PLAINTIFFS/APPELLANTS ROBERT LITTLE AND BARBARA LITTLE

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STATEMENT OF JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

The trial court entered an Opinion and Order in this case on February 26, 1999, granting summary disposition to Plaintiffs as a matter of law. On appeal, the Court of Appeals reversed the trial court's decision and remanded the case back to the trial court. Plaintiffs/Appellants Robert Little and Barbara Little are appealing from the Court of Appeals decision rendered in this case on February 1, 2002. *See* 249 Mich App 502; 644 NW2d 375 (2002).

By order of the Michigan Supreme Court dated November 19, 2002, the Court granted Plaintiffs/Appellants' application for leave to appeal. The Court also stated in its order that interested persons and groups may move the Court for permission to file briefs amicus curiae.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court properly grant summary disposition in favor of Plaintiffs/ Appellants (the riparian property owners)?

The trial court answered this question "yes."

The Court of Appeals answered this question "no."

Plaintiffs/Appellants assert that the answer to this question should be "yes."

Amicus Curiae Michigan Lakes & Stream Association, Inc. respectfully asserts that the answer to this question should be "yes."

II. To what extent, if any, may riparian or littoral rights be severed from riparian or littoral land?

III. To what extent, if any, may a riparian or littoral owner grant an easement to enjoy riparian or littoral rights?

IV. Do the answers to questions II and III, above, depend upon:

A. The type of body of water to which the land abuts (inland lake, Great Lakes, stream, river, etc.)?

B. Whether the original grantor owned the entire body of water and surrounding property?

C. Whether the body of water is privately or publicly owned?

GROUNDS FOR APPEAL

Plaintiffs/Appellants' appeal is apparently based on MCR 7.302(B)(3) and (5). This case involves legal principles of major significance to the state's jurisprudence. As the Court of Appeals noted in its decision, the scope of riparian and nonriparian rights, as well as related easements, has been a subject of substantial litigation in the state. The Court of Appeals' decision effectively nullifies important principles of law enunciated by this Court (as well as other panels of the Court of Appeals) in the past and will cause more, not less, litigation in this area. In addition, it appears that the decision of the Court of Appeals in this case conflicts with this Court's decisions in *Delaney* v *Pond*, 350 Mich 685; 86 NW2d 816 (1957); *Thompson* v *Enz*, 379 Mich 667; 154 NW2d 473 (1967); *Hess* v *West Bloomfield Twp*, 439 Mich 550; 486 NW2d 628 (1992); *Schofield* v *Dingman*, 261 Mich 611; 247 NW 67 (1933); and *Thies* v *Howland*, 424 Mich 282; 380 NW2d 463 (1985), as well as other decisions of the Court of Appeals.

I. STATEMENT OF FACTS

A. Undisputed Facts of the Case

Plaintiffs/Appellants Robert and Barbara Little (the "Littles") own a riparian parcel which has frontage on Pine Lake in Oakland County (the "Little Parcel"). Defendants/ Appellees Steven and Rosalyn Kin (the "Kins") own a nonriparian or "backlot" parcel immediately behind and adjoining the Little Parcel (the "Kin Parcel"). Finally, Defendants/Appellees Thomas and Darlene Trivan also own a nonriparian backlot parcel located immediately adjoining and behind the Kin Parcel (the "Trivan Parcel").

The Little Parcel has 100 feet of frontage on Pine Lake. Sixty-six feet of that frontage is encumbered by an easement or easements in favor of both the Kin Parcel and the Trivan Parcel (i.e., 33 feet each, although it appears that each family can use the whole 66 feet) (the "easement"). The language which created the easement benefiting the Kin Parcel and the Trivan Parcel states in relevant part as follows: "A permanent easement for access to and use of the riparian rights to Pine Lake ..."

At issue is whether pursuant to the easement, the owners of the two backlots can install a dock (or docks) and permanently moor a boat (or boats) at the shoreline and bottomlands of the lake where the easement intersects the shoreline, as well as engage in sunbathing, lounging, and similar sedentary activities along the easement.

B. The Michigan Lake & Stream Associations, Inc.

Michigan Lake & Stream Associations, Inc. ("ML&SA") is the largest formal organization in the state of Michigan which represents riparian property owners. ML&SA was founded just over 40 years ago. It is primarily an educational, research, and social

organization. Through its membership, affiliates, and related organizations, ML&SA represents, directly or indirectly, over 125,000 people in the state of Michigan. ML&SA is a state-wide organization.

ML&SA has extensive experience and expertise in the subject matter of this lawsuit, including safety issues relating to dockage and the mooring of boats, overcrowding on Michigan lakes, environmental issues relating to lakes, conflict between easement beneficiaries and other users of Michigan lakes, and similar matters. The outcome of this appeal could have a significant impact not only upon ML&SA and its members, but also upon many other riparian property owners and users of lakes throughout Michigan.

Unfortunately, the recent published Michigan Court of Appeals decision in *Little* v *Kin*, 249 Mich App 502; 644 NW2d 375 (2002), has caused significant confusion (and frustration) throughout the state regarding lake access easements, particularly where a court or party attempts to apply the *Little* opinion to a simple lake access easement. If one reads *Little* very carefully and narrowly, so that it generally does not apply to simple lake access easements, *Little* may be partially consistent with prior Michigan precedent. Regrettably, the decision in *Little* is being misunderstood and misconstrued by many. If, however, one reads *Little* v *Kin* as applying to all lake easements, including simple lake access easements, it clearly would be inconsistent with (and even conflicting with) prior Michigan precedent and the well-settled common law which has applied in Michigan over many years regarding simple lake access easements.

ML&SA seeks to file an amicus curiae brief in this matter due to the potential impact of this case not only on members of ML&SA, but also upon riparian and backlot property owners on lakes throughout the state of Michigan.

II. ARGUMENT

A. The Trial Court Reached the Right Decision, While the Court of Appeals Reached the Wrong Result

1. Simple language lake access easements

The language utilized in the easement in the present case contains travel language ("for access to"), as well as wording in addition to that simple access language. Nevertheless, ML&SA believes that it would be helpful to reexamine the long-standing case law regarding simple access easements, so that the easement language in the present case (which contains simple access easement language plus the words "and use of the riparian rights to Pine Lake") can be properly interpreted.

For at least half a century or more, a clear common law has evolved in Michigan regarding the interpretation and scope of lake access easements. Where the language creating an easement simply uses words of travel or access, such as "for the purposes of ingress and egress" to and from a lake (or similar words such as easement, right-of-way, or access), the common law which has developed in Michigan limits the easement use to travel and general access uses only—no docks, boats, lounging, etc. It is only where the easement language contains express wording in addition to general travel language that the courts have shown a willingness to look beyond the four corners of the document involved and get into subjective notions of original intent and history of usage by use of parol or extrinsic evidence.

The seminal case regarding boat moorage and dockage at the ends of relatively narrow easements which terminate at lakes or rivers is *Delaney* v *Pond*, 350 Mich 685; 86 NW2d 816 (1957). In *Delaney*, a 10-foot-wide access easement benefited several backlots for access to the Clinton River and Loon Lake. The easement in *Delaney* stated in relevant portion as follows: "This easement is provided for access to the river and shores of Loon lake by property owners in this subdivision." *Delaney* at 686. The Michigan Supreme Court held that the easement did not accord permanent mooring privileges for boats or the right to sunbathe. With regard to the scope of usage rights to an easement, the *Delaney* court stated as follows:

> The use of an easement must be confined strictly to the purposes for which it was granted or reserved.

Delaney at 687.

Essentially, the Supreme Court in *Delaney* adopted language from the opinion of the trial court judge as its own decision as follows:

> In the present case the extent of the easement is limited by specific words to the right of access to Clinton river and Loon lake. Defendants' lots are privately owned and subject to the plaintiffs' easement. This right of access is clearly intended to permit the plaintiffs to exercise their right to enjoy the waters of the Clinton river and Loon lake in common with all other property owners in the subdivision. Such right, however, to enjoy the use of the adjacent waters cannot logically be construed as a right to use the lands of the defendants for purposes other than those related to the use of the water itself.
>
> It would seem to follow logically therefore, that the plaintiffs do have an unrestricted right of access to the use of the waters of Clinton river and Loon lake for the purpose of swimming, fishing, bathing, wading and boating. It does not follow that the plaintiffs have the right to sun bathe on the defendants' property, for it cannot be said that sun bathing is a use of the adjacent waters, nor can it be said that permanent mooring a boat is included in the right to fish and boat. Obviously plaintiffs have the right to use the

> easement for the purpose of carrying their boats to the waters of the river and lake, but they cannot store them permanently on the easement way, nor attach them to stakes driven into the land.

Delaney at 687-688 (emphasis added).[1]

Following are discussions about several unpublished Michigan Court of Appeals decisions which are relevant regarding the present case. Clearly, unpublished opinions are not binding precedent. Nevertheless, this Court can take note of an unpublished opinion, particularly where the reasoning is persuasive. ML&SA respectfully asserts that the following opinions are highly persuasive and support ML&SA's view of *Delaney* v *Pond.*

One relevant unpublished Michigan Court of Appeals decision is *Miller* v *Petersen, et al* (unpublished Michigan Court of Appeals No. 111358, decided December 27, 1989), a copy of which is attached hereto as Exhibit A. In *Miller*, a 10-foot-wide access easement crossed platted Lot 77 in order to afford several backlots access to Clifford Lake in Montcalm County.[2] The easement gave the backlot owners "the right in common with other owners ... of ingress and egress ... over and across that part of Lot 77 ..." *See* Exhibit A. The backlot owners claimed the right to install and maintain a dock at the end of the easement at the lake and also presented proof that dockage had been utilized for many years at the easement. The trial court found that the easement was granted for access to the lake, with

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[1] Some backlot owners have attempted to deflate the *Delaney* decision by asserting that the holding in *Delaney* is "limited", that *Delaney* involved a river rather than a lake access easement and that *Delaney* involved an easement which ran parallel to the shoreline rather than a perpendicular easement. Such attempts to distinguish *Delaney* are incorrect. It is true that the case law makes certain distinctions based upon whether an access is "parallel" or "perpendicular" to a body of water, and that usage rights are normally slightly broader for "perpendicular" than "parallel" lake access devices. In actuality, *Delaney* involved both parallel and perpendicular accesses—the 10-foot easement in *Delaney* did parallel the Clinton River on its way to Loon Lake, as mentioned on pages 686 and 687 of the *Delaney* opinion. Nevertheless, the 10-foot-wide easement also terminated at a point perpendicular to Loon Lake. Additionally, ML&SA believes that a careful reading of the holding in *Delaney* makes it clear that the Supreme Court justices were deciding the case as if it were a "perpendicular" lake access case. A map of the 10-foot easement at issue in *Delaney* can be viewed at the end of the opinion in *Musser* v *Loon Lake Shores Association*, 384 Mich 616, 623; 186 NW2d 563 (1971).

[2] In addition to being 10-feet in width, the lake access easement in *Miller* also banned motor vehicles.

an implied right to enter the water for swimming and boating and an implied right to build a dock.

The Court of Appeals reversed the lower court decision and held that a dock could not be placed, maintained or installed at the easement. The relevant portion of the Court of Appeals' opinion is as follows:

> Reservation of a right-of-way for access to a water course cannot and does not give rise to riparian rights but only to a right-of-way. *Thompson* v *Enz*, 379 Mich 667, 685; 154 NW2d 473 (1967). The use of an easement must be confined strictly to the purposes for which it was granted. One of the principles underlying the use of all easements is that its owner cannot materially increase the burden of the easement on its servient estate or impose a new burden. *Delaney* v *Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).
>
> Here, the deed stated that the easement was for ingress and egress to the lake, and precluded the use of motor vehicles on the right-of-way.
>
> The court found as a matter of law that the expressed easement gave defendants riparian rights and that those riparian rights included the right to build a dock, citing *Tennant* v *Recreational Development Corp*, 72 Mich App 183; 249 NW2d 348 (1976), as authority. This was error.
>
> The trial court's reliance on *Tennant* is misplaced. *Tennant* concerns the rights of riparian owners. An easement given to several backlot owners for access to a lake does not give rise to a right to build a dock or permanently moor a boat at the end of that easement. *Thies, supra*, 297.
>
> Defendants also argue that there had been a dock at one time at the terminus of the easement. Defendants claim that *Thies* supports the right to build a dock, where it is shown that the platter so intended. *Thies* is distinguishable from the instant action which only concerns the owners of four lots.
>
> Whether the public has the right to erect and maintain a dock depends on the scope of the dedication of the property in question. *Thom* v *Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984). In the instant action, the easement was created for access to the lake, which cannot be expanded to include the building of docks. *Delaney, supra*, at 687.

> Hence, the trial court erred as a matter of law when it determined that the easement granted to defendants gave riparian rights to those defendants, including the right to build a dock at the terminus of the easement.

Miller at 2-3.

Krause v *Keeler Twp* (unpublished, Michigan Court of Appeals No. 220692, decided July 28, 2000), contains language which may be instructive to the current case. See Exhibit B as attached hereto. In *Krause*, the lake easement expressly permitted use for "bathing beach and park purposes." In that case, the easement beneficiaries erected and maintained docks and piers and docked and moored boats on the easement. Despite the fact that the easement language expressly allowed it to be used for "bathing beach and park purposes," the Court of Appeals firmly stated that no dockage or boat mooring rights were encompassed within the easement. The Court noted:

> The Michigan Supreme Court has clearly held that '[t]he use of an easement must be confined strictly to the purposes for which it was granted' so to not impose an additional burden upon the servient estate. *Delaney* v *Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Additionally, easements created to provide access to a navigable body of water have been strictly construed to provide no rights to permanently moor or dock boats or erect docks or piers. *Thies, supra* at 294-295; *Delaney, supra* at 687-688.
>
> The express language of plaintiffs' easement gives plaintiffs the right to use the easement for 'bathing beach and park purposes.' Bathing beach and park purposes would include activities such as swimming, sunbathing, fishing, and picnicking. Bathing beach and park purposes could not reasonably provide plaintiffs with the additional rights to moor or dock boats in the lake or on the shore or erect piers or docks. Interpreting the language to include these activities would impermissibly impose an additional burden upon the servient estate.
>
> ...
>
> Because plaintiffs did not have the right to permanently moor boats and erect docks or piers under the language of their easement, they were not deprived of a property right in this regard.

Krause at 2-3 (emphasis added).

The unpublished Michigan Court of Appeals case of *Trustdorf* v *Benson, et al* (unpublished Michigan Court of Appeals No. 103109, decided December 21, 1989), reiterates the common law in this area. A copy of that opinion is attached hereto as Exhibit C. In *Trustdorf*, a 25-foot-wide lake access easement was created based on the grant language "right-of-way to lake ..." The trial court determined that the easement could be used as a right-of-way for swimming, sunbathing, installation of a single dock and hoist, and such other rights as are necessary for the enjoyment of the specifically enumerated easement rights or those reasonably implied by such rights. *Trustdorf* at 2. Although the Court of Appeals decided many issues in the *Trustdorf* case which are not germane to the present lawsuit, the Court of Appeals reversed the trial court in part and held that the lake access easement did *not* include the right to install a dock and boat hoist. Specifically, the Court stated:

> Next, defendant argues that the trial court erred in ruling that the easement included the right to install a dock and boat hoist. We agree. The right to construct a dock or to permanently anchor a boat off shore is a riparian right. *Thies* v *Howland*, 424 Mich 282, 288, 294; 380 NW2d 463 (1985). An easement or right-of-way does not give rise to riparian rights unless the plat's dedication of the easement or right-of-way or the grant of the easement or right-of-way evidences an intent to grant a specific riparian right, such as the construction of docks. *Thies*, *supra* at 294-295; *Thompson* v *Enz*, 379 Mich 667, 685, 154 NW2d 473 (1967). The language in the plat dedication which establishes the right-of-way only establishes lots 18a and 19a as rights-of-way to the lake for lots 18 and 19, respectively. Nothing in the language on the plat establishes the grant of any riparian rights in connection with those rights-of-way. Accordingly, we conclude that the trial court erred in determining that plaintiffs enjoyed any riparian rights to the right-of-way on lot 19a, specifically the right to erect a dock and boat hoist. Accordingly, that portion of the trial court's judgment is vacated.

Trustdorf at 5.

Gross v *Mills* (unpublished Michigan Court of Appeals decision No. 21176, decided September 28, 1999), also clearly reiterates the established Michigan common law that a simple lake access easement does not have dock or boat moorage rights. A copy of that opinion is attached hereto as Exhibit D. The easement at issue was 10 feet wide and stated that it was "to be used for access to and from the waters of Garver Lake." The lower court held in favor of the servient (i.e., riparian) property owner. The Court of Appeals upheld the trial court and stated:

> The [lower court] noted that the scope of the easement is well defined under Michigan law and does not include riparian ownership rights, or the right to install a pier or permanently dock a boat. Rather, the easement holder has only the right to traverse the land to access a given lake. Because the deed language in this case did not afford defendants additional rights, plaintiffs were entitled to the requested declaratory and injunctive relief.

Gross at 3.

The following language from the Court of Appeals in *Gross* is particularly instructive:

> Finally, Mills contends that even if defendants have merely an easement in the riparian land, it does not preclude a finding that defendants have a right to erect a pier or permanently anchor boats. Persons who own riparian land enjoy exclusive rights, including the right to erect and maintain docks along the owner's shore and the right to permanently anchor boats off the owner's shore. Unless the language granting an easement evidences otherwise, an easement in riparian land generally affords only the right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. ... The trial court concluded that the language in defendants' deed, i.e., 'to be used for access to and from Garver Lake,' granted an easement for the purpose of ingress and egress but not for the purpose of constructing a pier or the permanent anchoring of boats. This finding is not clearly erroneous because the deed language 'does not evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners' ... An easement holder's rights are defined by the terms of the easement agreement and must be confined to the purposes for which the easement was created. 'A person entitled to the use of an easement cannot

> materially increase the burden upon the servient estate beyond what was originally contemplated ...'

Gross at 4-5 (citations omitted).

The Michigan Supreme Court in *Thies* v *Howland*, 424 Mich 282; 380 NW2d 463 (1985), also applied the law of *Delaney* in denying backlot owners the rights to construct a dock or permanently moor boats off the terminus of an easement. Most of the appellate opinion in *Thies* involved platted (i.e. dedicated in a plat) walkways, alleys and driveways within a plat along Gun Lake. Nevertheless, one portion of the opinion did address an easement which was *not* created by platted dedication, but rather an 8-foot wide easement created by a 1975 consent judgment across a riparian lot.[3]

The Supreme Court in *Thies* noted that the dock was not built at the terminus of a platted dedicated alley or walkway, but rather at the end of the above-mentioned easement. The Supreme Court upheld the decisions of the trial court and the Court of Appeals which indicated that dockage and permanent anchoring of boats were not within the scope of the easement. Specifically, the *Thies* court stated in relevant part as follows:

> The use of the easement was narrowly defined to include only limited vehicular traffic, the hand carrying or dragging of small boats to and from the lake, and walking. The trial court concluded that the easement agreement did not grant defendants the right to construct a dock. The Court of Appeals concluded that the permanent anchoring of boats was not within the scope of the easement.
>
> Plaintiffs owned the fee in the land over which the easement runs and the bed of the lake at and beyond the end of the easement. Defendants' use of plaintiffs' land is determined by the terms of the easement agreement and must be confined to the purposes for which the easement was created. A person entitled to the use of an easement cannot materially increase the

[3] The easement in *Thies* admittedly contained significant limitation language. Nevertheless, the general principles enunciated in *Thies* are reflected in many other cases.

> burden upon the servient estate beyond what was originally contemplated. *Delaney*, 350 Mich 687; and *Bang*, 244 Mich 574.
>
> The lower courts did not err in concluding that the consent judgment did not grant defendants the right to construct a dock. In addition, the Court of Appeals correctly held that the right to anchor boats permanently off the terminus of the easement was not permitted.

Thies at 296-297.

In *Haag* v *Callard* (unpublished Michigan Court of Appeals Case No. 223658, decided February 15, 2002), a "landing" was dedicated to the use of all properties within a plat. The easement in *Haag* did not use mere travel language. Furthermore, construction also had to be resorted to due to the ambiguous meaning of "landing." The Court of Appeals ultimately found that the word "landing" was not merely access or travel language but encompassed dock and boat moorage rights.[4] See Exhibit E as attached.

The Court of Appeals in *Little* stated that when interpreting usage rights pursuant to an easement, the "scope of a nonriparian lot owners' rights under an easement on riparian land must be examined in light of the intent of the plattors and the intent of the plattors must be determined from the language they used and the surrounding circumstances." *Little* at 511-512.[5] Or put another way, "the intent of the plattors must be

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[4] Interestingly, *Haag* discusses *Delaney* v *Pond*, 350 Mich 685; 86 NW2d 816 (1957), and also indicates that simple access easements do *not* carry overnight boat moorage rights:

> Nonriparian owners who via an easement gain a 'right of access' to a navigable body of water have the right to use the water for such activities as boating, fishing, and swimming. *Delaney* v *Pond*, 350 Mich 685, 687-688; 86 NW2d 816 (1957). Unless specified otherwise, the nonriparian easement holder's right of access for boating encompasses the right to temporarily anchor boats within the easement area, but not the right to permanently store boats as the riparian owners are entitled to do. *Id.* at 688.

Haag at 2. When *Haag*, *Delaney*, and other cases talk about the right of the public and a nonriparian easement holder's right of access to boat, fish, and swim, they are referring to rights which anyone has to use the surface of the water once they reach the water. ML&SA respectfully asserts that the right of the public and nonriparian easement holders to temporarily anchor boats applies while the owner is present and does not include a right to overnight mooring or while the owner is not present.

[5] The court in *Little* refers to interpreting an easement in a plat which was created by a plattor. It should be noted that the easement in the present case was apparently not created by plat dedication.

determined from the language they used and the surrounding circumstances." *Thies* at 293 (although the *Thies* court was also discussing a plat dedication situation). Nevertheless, ML&SA respectfully asserts that this rule applies only where the express easement language is ambiguous, which is normally only the case where the easement wording utilizes ingress and egress or travel language plus additional language evidencing an intent on the face of the document to grant more than mere travel or access rights.

The backlot owners in this case appear to be arguing that *Little* stands for the proposition that the same weight should be accorded by the courts to the original subjective intent of the original grantor (as divined by parol or extrinsic evidence) and the surrounding circumstances (i.e., historic usage) as the written words of the easement document itself. They also appear to be asserting that construction should always be resorted to (including parol or extrinsic evidence), even if the easement wording is clear on face. Respectfully, Michigan case law prior to *Little* did not stand for such propositions. In an unambiguous document, the actual wording is the embodiment (as well as the best evidence) of the grantor's intent.

Where written real estate documents are unambiguous and unequivocal, their construction is for a court to decide as a matter of law. *Mt Carmel Hospital* v *Allstate Ins Co*, 194 Mich App 580, 588; 487 NW 2d 849 (1992). Where no ambiguity exists, the courts must follow the plain language of the document. In such a case, no extrinsic or parol evidence is admissible. *Bennett* v *Eisen*, 64 Mich App 241; 235 NW2d 749 (1975). To the extent that it is necessary to ascertain the intent of the parties to the document, it must be

drawn from the four corners of the document.[6] *Flajole* v *Gallaher*, 354 Mich 606, 609; 93 NW2d 249, 251 (1958); *Purlo Corp* v *3925 Woodward Avenue, Inc*, 341 Mich 483; 67 NW2d 684 (1954).

> We do not hold that there is no possibility of semantic ambiguity in the above-quoted provision. There is, and the unhappy fact is that the possibility of such an ambiguity lurks in almost every written instrument devised by man; it is indeed one of the dilemmas of language; but to hold that this ambiguity is actionable and is thus sufficient to open the door to parol evidence to determine the intent of the parties would be in effect to dissolve the salutary rule that where possible the intent of the parties must be drawn from the 4 corners of the instrument. This we do not intend to do.
>
> The issue in cases of this nature is not whether there is any possible ambiguity, but whether any ambiguity which arguably may exist is, on its fact, so palpable and so grave that recourse must be hand to explanation lying without the instrument. Stated another way, if one seeks admission of parol evidence to prove the existence of a condition subsequent we think he must point to an ambiguity in the deed that is obvious, not merely a semantic possibility.

Flajole at 609. Where a real estate document is not ambiguous and the grantor's intent is discernable from the four corners of the document, courts should not resort to extrinsic or parol evidence and the actions of the parties, both contemporaneous and subsequent to the grant, are not relevant.[7]

ML&SA believes that where a lake access easement utilizes only travel, access, or ingress and egress language (without additional language or words such as "landing," "dock," "boat," etc.), Michigan case law deems the language to be unambiguous and requires that

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[6] ML&SA respectfully asserts that it is particularly important with written documents involving real property not to engage in construction or a battle involving parol or extrinsic evidence if the document is clear and unambiguous. Certainty is necessary in real estate transactions and *ad hoc* subjective determinations could create uncertainty and chaos.

[7] ML&SA does not address any prescriptive rights which the Kins or Trivans might have (if any) as to a dock and boat, since that was apparently not at issue at the trial court level. History of usage can, of course, be important even in a case where only a simple lake access easement is involved where such evidence goes to the issue of potential prescriptive rights, rather than original intent or the scope of original usage rights.

courts find no rights to dockage, boat moorage, lounging, etc. In essence, the courts have created a "bright line" test—if simple travel or access language is used, no docks or boat moorage. This "bright line" test has promoted certainty in real estate transactions, has cut down on litigation over simple lake access easements, and has helped lessen *ad hoc* or subjective determinations by trial courts. Accordingly, absent ambiguity, it is not appropriate for trial courts to look beyond the four corners of the easement document involved and entertain parol or extrinsic evidence relating to the subjective intent of the grantor, history of usage (at or after the time the easement was granted), and similar matters.

Why should the courts not delve into parol and extrinsic evidence regarding the subjective original intent of the grantor and the past history of easement usage where the easement language clearly utilizes only access, ingress and egress, or travel language? There are many reasons. First, of course, such inquiries would violate the Michigan Statute of Frauds if there is no ambiguity. Second, it would violate long-standing Michigan precedent in this area. *See Delaney* and *Thies*, as well as the persuasive cases of *Hoisington* v *Parkes* (Exhibit F; see the discussion, below); *Miller* v *Petersen* (Exhibit A); *Krause* v *Keeler Twp* (Exhibit B); *Trustdorf* v *Benson* (Exhibit C); and *Gross* v *Mills* (Exhibit D). Riparians and easement beneficiaries have relied on those cases for many years and to now all of a sudden disregard the common law which has evolved in this area and turn each narrow lake access easement dispute into an extensive trial involving parol and extrinsic evidence regarding events from many years ago would greatly unsettle real estate matters and burden the courts. Third, real property law especially requires certainty and predictability. Based on the longstanding case law in this area, it has been widely assumed that lake

access easements do not accord the easement beneficiaries dockage, boat moorage, or sunbathing rights. The *Little* opinion by the Court of Appeals (or at least the widespread misinterpretation of it as applying to simple lake access easements) will, if not reversed or clarified, upset long-established easement and property rights notions throughout the state. Interestingly, the Court of Appeals in this case justified its decision in part based on the notion that "where possible, courts should honor the intent and established relationships of the parties by refraining from rewriting the original easement agreements, on which may residents of our state have relied for years without complaint or controversy. Furthermore, giving effect to the clear expression of the grantor in drafting easements for the benefit of lot purchasers, appropriately honors the expectations of the parties." *Little* at 515 (footnote omitted). Ironically, the impact of the Court of Appeals' decision itself in *Little*, if not reversed, modified, or clarified, will indeed undermine established relationships among property owners, thwart the clear meaning of many easement documents, initiate new controversies, and breed almost limitless litigation regarding lake easements. Fourth, since the overwhelming majority of lake access easements in Michigan were created many decades ago (and in some cases, well over 50 or even 75 years ago), parol evidence and testimony regarding people's recollection of events many years ago is particularly unreliable.[8]

The *Hoisington* v *Parkes* case (unpublished Michigan Court of Appeals decision, Case No. 204515, decided March 12, 1999), is also instructive in this area. In that case,

[8] Due to the problems associated with lake access easements (which include the devaluation of riparian properties, safety concerns, and conflict among users), creation of these types of easements in recent years has become relatively rare. Furthermore, for the past few decades, many municipalities have banned (or severely restricted) the creation of new lake access easements due to problems associated with their use.

there was conflicting testimony as to whether a dock was regularly utilized at the easement at the lake, going back to the time when the easement was created. *See* Exhibit F as attached hereto. Nevertheless, the Court of Appeals refused to look at original intent or the actual historical usage of the easement area, presumably because the easement language was unambiguous. The *Hoisington* court stated:

> An easement or right-of-way does not give rise to riparian rights unless the grant of easement or right-of-way evidences an intent to grant a specific riparian right, such as the construction of docks.
>
> The intent of the plattors or grantors in conveying an easement should be determined with reference to the granting language used in connection with the facts and circumstances that existed at the time of the grant.
>
> ...
>
> And, clearly, nothing in the easement language establishes the grant of any riparian rights in connection with the easement.

Hoisington at 2-3 (citations omitted). Thus, *Hoisington* stands for the proposition that where the easement language is clear and does not expressly accord dock or boat moorage rights to backlot owners, that language should govern without attempting to ascertain the facts and circumstances that existed at the time of the grant.

As mentioned above, when one carefully reviews the Michigan Supreme Court precedent in this area as specified in *Delaney* and *Thies* (and the relevant Michigan Court of Appeals cases as well), it should be clear that relatively narrow perpendicular lake easements which contain only ingress and egress, access or travel language are not ambiguous and do *not* accord easement beneficiaries dock, boat moorage, lounging,

sunbathing, or similar rights, regardless of historical usage.[9] Uses normally reserved for riparians (such as docks, boat moorage and lounging) are *not* normal incidents of or to be implied from simple access or travel easements.

Unfortunately, a footnote contained in *Little* v *Kin* has caused some additional confusion, even regarding simple lake access easements. Footnote 6 on page 513 of the *Little* opinion comes after a discussion of *Dobie* v *Morrison*, 227 Mich App 536; 575 NW2d 817 (1998), a dedicated park case. The wording of footnote 6 appears to indicate that the four unpublished Michigan Court of Appeals decisions listed therein support the notion of using extrinsic and parol evidence and that potentially any access easement can have dockage rights. Interestingly, three of the four unpublished Michigan Court of Appeals cases cited appear to stand for the exact opposite proposition, while the fourth case cited has no relevance.[10] *Gross* v *Mills* and *Hoisington* v *Parkes* clearly stand for the proposition that simple lake access easements do not accord dock or boat mooring rights and that parol or extrinsic evidence should not be resorted to where unambiguous language is used. Finally, *Woolley* v *Baier* (unpublished Michigan Court of Appeals Case No. 210262, decided June 19, 1999) bolsters the view that simple lake access easements do not contain dockage or permanent boat moorage rights and extrinsic evidence should normally only be entertained where easement language is ambiguous. *See* Exhibit H as attached hereto. In *Woolley*, the easement contained the phrases "bathing and boating" and "recreational purposes." The

[9] Again, historical usage of docks and boats at such easements might be relevant for purpose of prescriptive easement rights if the easement beneficiaries are claiming that they exceeded the scope of usage rights over the years, but historical usage is not relevant in such cases for determining the proper scope of usage under the original easement.

[10] *Evans* v *Gabriel* (unpublished Michigan Court of Appeals Case No. 212759, decided December 28, 1999) is really irrelevant to *Little* and the case at hand. That case involved the applicability of a township zoning regulation to an easement and the *dicta* which discussed the easement was tangential at best. See Exhibit G.

Court of Appeals held that those terms were somewhat ambiguous, thus allowing the lower court to consider parol and extrinsic evidence and to examine past history and conduct. In *Woolley*, the Court of Appeals noted that a real estate document that contains no ambiguities generally must be construed according to its terms.[11] The court in *Woolley* also drew a distinction between wide, park-like lakefront easements (such as in *Dobie* and *Cabal*) and narrow lake access easements wherein the *Woolley* court noted that the lake access easement in *Delaney* involved only "mere ten-foot-wide and 12-foot-wide easements along the lake." *Woolley* at 3.

Some backlot owners have cited *Cabal* v *Kent County Road Comm'n*, 72 Mich App 532; 250 NW2d 121 (1976), for the supposed proposition that simple access easements can have dockage and boat moorage rights. With all due respect, *Cabal* does not support that proposition. *Cabal* may not even constitute good law. *Cabal* (a Michigan Court of Appeals decision) appears to be in conflict with *Delaney* (a Michigan Supreme Court decision). Furthermore, *Cabal* may have been implicitly overturned by *Thies* v *Howland*. Even if *Cabal* remains good law, however, it can be easily distinguished due to its very narrow holding and its facts. It is true that in *Cabal*, the Michigan Court of Appeals did permit nonriparian owners to maintain docks (together with two boats per lot) on a wide lake access easement, but interestingly enough, also prohibited backlot owners from lounging, sunbathing, or picnicking on the easement. Quite simply, it appears that *Cabal* is an aberration and was probably wrongfully decided. In *Cabal*, the Michigan Court of Appeals stated that, "the right of [the easement holders] to maintain docks is reasonably

[11] The *Woolley* court also noted that in addition to the express boating and recreational contained language in the easement in that case, the easement property was "relatively large." *Woolley* at 3.

appurtenant to their easement to enjoy boating in the lake." *Cabal* at 536. That statement directly contradicts the central holdings in *Delaney*, wherein the Michigan Supreme Court stated as follows:

> It does not follow that the [easement holders] have the right to sun bathe on the defendants' property, for it cannot be said that sun bathing is a use of the adjacent waters, nor can it be said that permanent boat mooring a boat is included in the right to fish and boat. Obviously, plaintiffs have the right to use the easement for the purpose of carrying their boats to the waters of the river *and lake* but they cannot store them permanently on the easement way, nor attach them to stakes driven into the land.

Delaney at 687-88 (emphasis added).

Even if one assumes that *Cabal* was correctly decided, it should not have widespread application to other lake access easement cases (particularly where multi-party narrower easements are involved), due to the uncommon factual situation involved in *Cabal*. The easement in *Cabal* was very unusual. The case involved lots located immediately across the street from a long lakefront strip of land fronting on Big Crooked Lake. The entire long strip of land located between the lake and the road was subject to an easement in favor of the lots across the road. By the time of the court challenge, most of the lot owners had utilized the portion of the strip of land across the street from their respective house or cottage for many years for boat mooring, dockage, etc. Each lot owner had a significant amount of frontage to utilize. There did not appear to be "cross" use—each cottage owner apparently utilized the fairly wide land strip under the easement across the road from their respective cottage. The easement bound the entire property where the easement was located. In actuality, *Cabal* is more of a park case (like *Dobie* v *Morrison*) than a narrow, perpendicular lake access easement case.

If one studies these lake easement cases very carefully, they fall into two general categories of cases. The first category involves relatively narrow (8-25 feet wide) perpendicular lake access easements used by more than one backlot owner. These cases include *Hoisington* (Exhibit F), *Gross* (Exhibit D), *Miller* (Exhibit A), *Trustdorf* (Exhibit C), *Thies*, and *Delaney*. In not one of these cases did the appellate courts find a right to dockage or permanent boat moorage for the easement beneficiaries. The second category of cases could be called the "park" or "wide easement" cases. These include *Cabal* and *Dobie*. In these cases, the courts found dockage and boat mooring rights (or at least the possibility) based on the following factors:

- Broad or wide lakefront easement areas
- Parklike traits
- Ambiguous dedication or easement language

The tendency of some trial court judges to attempt to expand the proper scope of usage rights for simple access easements to lakes is perplexing. Unfortunately, it appears that some courts may have accepted the false premise that a lake easement without dockage and boat mooring rights would be worthless and would greatly diminish the value of the benefited backlots. Lower courts which would never dream of arbitrarily altering property boundaries, expanding conventional access easements or expanding other property rights by fiat seem blinded by many laypersons' notion that lake access devices must have docks and permanent boat moorage privileges in order to be enjoyed. There are numerous water activities which can be enjoyed via lake access easement even where dockage and permanent boat mooring privileges are not provided. Absent dock and permanent boat

moorage rights, the beneficiary of a lake access easement (including the Kins and Trivans in the present case) can still enjoy all of the following rights and privileges:

- Swimming
- Access to the ice in the winter for ice skating, cross-country skiing, and ice fishing
- Walking to and from the lake
- Fishing off shore or fishing with waders
- Day boat usage (i.e., carrying a rowboat, canoe, paddle boat, small sailboat, windsurfer or other small watercraft onto and off of the water during the same day)
- For viewing the lake

Even without dockage and boat mooring privileges, selling a backlot with a lake access easement still adds great value to the backlot. People simply desire to have access to lakes. It is highly unlikely that the fine point about whether a lake access easement permits dockage or not would greatly affect the market value of the backlot. To state that the owner of a riparian lot who creates a lake access easement across the lake lot for the benefit of a backlot owner must have intended to grant dockage and boat moorage rights to the backlot is not logical—rather, it is almost always more likely that the grantor would have intended to accord only limited lake access rights in order to increase the value of the backlot, but not dockage and boat moorage rights which would greatly detract from the value of the burdened lakefront lot.

Backlot owners have often asserted that dockage and permanent boat moorage are absolutely necessary to the enjoyment of a lake access easement and the lake. Some have asked, "What's the use of having a boat if you don't have a dock?" Despite that superficial assertion, the Michigan Supreme Court itself in *Delaney* recognized the utility of being able to access a lake for the purpose of swimming, fishing, bathing, wading, and boating, even if

dockage and permanent boat mooring privileges are not included. The *Delaney* court stated:

> It would seem to follow logically therefore, that the plaintiffs do have an unrestricted right of access to the use of the water of Clinton river and Loon lake for the purpose of swimming, fishing, bathing, wading and boating. It does not follow that the plaintiffs have the right to sun bathe on the defendants' property, for it cannot be said that sun bathing is a use of the adjacent waters, nor can it be said that permanent mooring a boat is included in the right to fish and boat. Obviously plaintiffs have the right to use the easement for the purpose of carrying their boats to the waters of the river and lake, but they cannot store them permanently on the easement way, nor attach them to stakes driven into the land.

Delaney at 687-688.

The trial court in *Miller* v *Peterson* also took the view that an access easement to a lake would be "useless" without a dock. See Exhibit A as attached hereto. The Court of Appeals rejected that view in its appellate decision in *Miller* v *Peterson*.

2. The phrase "use of the riparian rights to Pine Lake" in this case does not accord dock or boat moorage rights to the backlot owners

Admittedly, the easement in this case contains more than common travel or lake access wording—the easement also uses the phrase "and use of the riparian rights to Pine Lake ..." Thus, while the case law regarding simple lake access easements is helpful, it is not by itself necessarily determinative of this case. Theoretically and without regard to existing case law, the easement language in this case could be interpreted in four different ways, resulting in one of the following decisions:

- Holding that the "use of riparian rights" language is superfluous and has no effect, such that that above-mentioned case law for simple lake access easements applies (i.e., no dockage or permanent boat moorage and no lounging, sunbathing, etc.).

- Holding that any attempt to convey riparian rights to a backlot owner is null and void, such that the case law regarding simple lake access easements applies (i.e., no dockage or permanent boat moorage and no lounging, sunbathing, etc.).
- Holding that the "riparian rights" language does not actually mean full riparian rights, but is limited to the historical usage and what the court deems to be reasonable (i.e., for example, one dock and one or two boats).
- Holding that the backlot owners essentially have full riparian rights, and can utilize dockage, multiple boat moorings, lounging, sunbathing, etc., limited only by the reasonable use doctrine.

ML&SA respectfully asserts that the existing case law (or a reasonable extrapolation therefrom) dictates that either the first or second option, above, should apply—that is, that the "riparian rights" language is either superfluous or should be considered null and void, `thus prohibiting dockage, permanent boat moorage, lounging, sunbathing, etc. for the backlot owners in this case. ML&SA believes that such a conclusion is warranted based upon *Thompson* v *Enz*, 379 Mich 667; 154 NW2d 473 (1967); *Schofield* v *Dingman*, 261 Mich 611; 247 NW 67 (1933); and *Delaney* and its progeny (as discussed above).

The ultimate resolution of this case will undoubtedly involve a careful analysis of *Thompson* v *Enz*, 379 Mich 667; 154 NW2d 473 (1967) (opinion of Kavanagh, J.). The *Thompson* court noted that, "'[r]iparian land' is defined as a parcel of land which includes therein a part of or is bounded by a natural water course." *Thompson* at 677. In this case, the parties have apparently agreed that Plaintiffs are riparian property owners, while Defendants are not. The *Thompson* court also held as follows:

> We hold that riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural water course.
>
> While riparian rights may not be conveyed or reserved — nor do they exist by virtue of being bounded by an artificial water course — easements, licenses

> and the like for a right-of-way for access to a water course do exist and ofttimes are granted to nonriparian owners.

Thompson at 686 (emphasis added).[12]

The *Thompson* court also recognized its prior decision in *Schofield* v *Dingman*, 261 Mich 611; 247 NW 67 (1933), a case which this brief discusses further below. With regard to *Schofield*, the *Thompson* court stated as follows:

> In the case of *Schofield* v *Dingman*, 261 Mich 611, the Court was considering a situation similar to the case at bar. One Turner owned land bordering on Lake Michigan and had prepared a plat of a part of it. There was a bluff about 50 feet above the water at this point along the lake and at times the water washed the foot of the bluff. Most of the time, however, there was a sand beach between the bluff and the water. The plat was laid out along the top of the bluff. Turner planned to sell those lots for resort purposes and to promote sales attempted to convey riparian rights with the lots. Turner died, and the defendants acquired his rights to the land between the bluff and the water and claimed exclusive right to possession and control thereof. Of the granting of the riparian rights to the back lot purchasers, the Court said (p 613):
>
> > 'Riparian rights,' accorded lot owners separated from the beach by intervening lots, can be given no greater meaning than right of access to the beach and enjoyment thereof for the purposes of recreation.

Thompson at 678.

The *Thompson* court also quoted approvingly from a Connecticut case as follows:

> In the case of *Harvey Realty Co. v. Borough of Wallingford, supra*, Justice Hinman, writing for the Court, stated (111 Conn 352, 358, 359):
>
> > It is clear that the grantees or contractees, from the plaintiff, of lots separated from and not bordering on Pine lake can have, of their own right, no riparian privileges in its waters. And any attempted transfer of the rights made by a riparian to a nonriparian proprietor is invalid. (Citing text and cases. Emphasis supplied.)

[12] It is interesting to note that although the *Thompson* court stated that easements, licenses, and rights-of-way for access to waters do exist and are granted, the court did not address whether or not such devices are valid.

Thompson at 682.[13]

ML&SA respectfully asserts that a careful reading of *Thompson* (as well as *Delaney*, *Schofield*, and the unpublished Court of Appeals cases mentioned above) reasonably leads one to the conclusion that the words "and use of the riparian rights to Pine Lake" in the easement in the present case should be deemed either mere surplusage (and of no effect) or alternately, null and void.

Even if the case law were to theoretically permit the creator of an easement to accord broad rights to the owner of a backlot (including rights such as dockage, permanent boat moorage, lounging, sunbathing, etc., such that the usage rights of the backlot owner nearly approach those of the riparian property owner), simply using the phrase "riparian rights" in the grant of easement renders the grant unduly vague. Does that language mean that the owner of the underlying lakefront property is no longer riparian, since the right of the easement holder would effectively "crowd out" the owner of the underlying soil? That would also seem to contradict the maxim that easements are not deemed to be exclusive (i.e., to the exclusion of the owner of the underlying soil) unless so indicated on face. Can there effectively be two sets of riparian users with full riparian rights—the owner of the underlying lakefront property and the backlot easement beneficiary (or beneficiaries)?

To the extent that the phrase "riparian rights," when added to the simple lake access easement language, means anything, it should simply encompass the right of nonriparian owners and members of the public who gain access to a navigable water body to have a right to use the surface of the water in a reasonable manner for such activities as boating,

[13] In its *Little* v *Kin* opinion, the Michigan Court of Appeals noted the *Thompson* court's quotation from the Connecticut case, but believed that the Michigan Supreme Court "merely quoted this proposition from a Connecticut case in summarizing decisions from other states." *Little* at 510 (n 4).

fishing, and swimming. *See Thies* v *Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985); *Delaney* at 687-688.[14]

The original creator of the easement in this case could have used specific language in the easement (in addition to the lake access wording) in an attempt to give the backlot owners specific use rights such as dockage, boat moorage, picnicking, and other uses (i.e., for example, "together with the right to install and use a dock" or "and with boat moorage rights"). The grantor chose not to do so. As the case law noted above has clearly indicated, lake access easements are generally construed against granting indices of riparian rights (such as dockage, permanent boat moorage, etc.) unless the easement language expressly grants a specific otherwise riparian right.

> An easement or right-of-way does not give rise to riparian rights unless the grant of easement or right-of-way evidences an intent to grant a specific riparian right, such as the construction of docks.

Hoisington at 2. The *Thies* court also noted as follows:

> The term 'joint use' standing alone does not evidence an intent to grant a right to construct docks, a right which is normally reserved to riparian owners.

Thies at 294 (footnote omitted).

Finally, the *Thompson* court noted as follows:

> Defendants direct attention to the statement of Justice Fead in the case of *Bauman* v *Barendregt*, 251 Mich 67, 69:
>
> > It is a settled rule in this State that, where there is no reservation of them, riparian rights attach to lots bounded by natural water courses. (Citing cases; emphasis supplied.)

[14] In its published opinion, the *Little* court blanketly states that the original owner's grant of an easement to the defendant backlot owners involved "full" riparian rights. *Little* at 504. With all due respect to the Court of Appeals, the easement language never used the word "full" in conjunction with the phrase "riparian rights."

> We hold that what is meant by this 'reservation' of riparian rights is merely the reservation of a right-of-way for access to the water course. In *Richardson* v *Prentiss*, 48 Mich 88, upon which Justice Fead relied in making this statement concerning reservation of rights, it is clear that the Court while speaking of the reservation meant a reservation, not of riparian rights, but rather of a right-of-way (p 91). This, however, cannot and does not give rise to riparian rights. *Schofield* v *Dingman*, 261 Mich 611.

Thompson at 685.

If an easement for backlots near a lake is properly drafted, what is the limit on the number of rights which can be granted to a backlot owner so long as those rights are expressly and clearly stated in the easement language? Happily, this Court need not reach that issue in this case. Rather, it is enough simply to state that unless lake usage rights (which are otherwise normally the exclusive domain of riparian property owners) are expressly and clearly stated in an easement document (the generic and vague phrase "riparian rights" not being sufficient and of no effect), the easement will be deemed to be for lake access purposes only.

Interestingly, the Court of Appeals below never substantively discussed *Schofield v. Dingman* in its lengthy opinion. And admittedly, the exact holding in *Schofield* is confusing, if not elusive. *Schofield* involved a development along Lake Michigan. Some of the lots were located along the bluff that overlooked the beach.[15] The remaining lots were located further away from the lake and did not abut the bluff or the lake. It appears that the developer attempted to retain ownership in the beach itself, but incorporated in

[15] It is not entirely clear from the opinion in *Schofield* whether or not these "bluff lots" touched Lake Michigan and were truly riparian. A strip of land along the lake may have been retained by the developer, but it is unclear from the opinion what specifically was retained, if anything. Nevertheless, the *Schofield* court appears to have treated the bluff lots almost as if they did have lake frontage and were riparian. The conveyance to the owners of the bluff lots stated that those lots extend "to the bank of Lake Michigan" and with "riparian rights." *See also, Turner Property Owners* v *Schneider*, 4 Mich App 388, 390; 144 NW2d 848 (1966), which involved many of the same underlying facts. The Supreme Court did note in *Schofield* that at times of high water, the water actually washed all the way up to the foot of the bluff while at other times, there was sand between the bluff and the water. *Schofield* at 612.

conveyances a statement that all of the lots (both the bluff lots and backlots further back) had "riparian rights." Both the trial court and the Michigan Supreme Court distinguished between the rights of the front lot owners (i.e., owners of the bluff lots), and those of backlot owners. The phrase "riparian rights" with respect to the backlot owners was interpreted only to provide backlot owners with an easement for access to the beach and enjoyment thereof for purposes of recreation, not full riparian rights:

> 'Riparian rights' accorded lot owners separated from the beach by intervening lots can be given no greater meaning than right of access to the beach and enjoyment thereof for the purposes of recreation. This decree granted, and was what Mr. Turner clearly intended by the misnomer 'riparian rights.'

261 Mich at 613 (emphasis added).[16] Note that the Supreme Court considered the phrase "riparian rights" to be a misnomer. *Id.*

The Michigan Supreme Court also noted that the owners of the bluff lots had more extensive rights:

> The owners of lots abutting the edge of the bluff were accorded some additional rights by the decree, however, short of title to land not conveyed to them. Other deeds were of specific quantities of land ending at the bluff, and the term 'riparian rights' in such conveyances of land, short of reaching the meander line, must be held to have vested only a permanent easement suitable of enjoyment of direct access to the lake and use of methods and means adapted to such end.

261 Mich at 613.

For the owners of the bluff lots, the trial court's decree (which was upheld) did grant them the right (subject to certain enumerated limits) "to make every other use thereof lawfully

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[16] Where the *Schofield* court indicated that the easement beneficiaries enjoy both a right of access to the beach and enjoyment thereof for the purposes of recreation, it is highly likely that such right of "recreation" simply means the same right of nonriparian owners and members of the public who gain access to the waters of the Great Lake and shoreline thereof to use the surface of the water and the "wet beach." *See Thies* at 288 and *Delaney* at 687-688.

incident and belonging to an owner of property having "riparian rights." *Schofield* at 613-614.

The courts in *Schofield* and *Schneider* apparently treated the property owners whose land abutted the bluff and which extended to the bank of Lake Michigan as riparian owners with respect to such rights. The courts did not accord the backlot owners those same rights, despite the use of the phrase "riparian rights" in their deeds. *Schofield* is consistent with the way that this Court has treated the "first tier of lots" in other lake cases where there is an intervening road or park property. For example, in *McCardel* v *Smolen*, 404 Mich 89 (1978), the court held that where a lot is separated from a lake by only a road, the first tier of lots is normally deemed to be riparian. *See also, Croucher* v *Wooster*, 271 Mich 337 (1935); *Thies* at 291-293. Also, where a dedicated park is located between a lake and a lot which has frontage on the park, that lot is normally also deemed to be a riparian property. *See Dobie* v *Morrison*, 227 Mich App 536; 575 NW2d 817 (1998).

B. Does it Matter what Type of Body of Water is Involved (Inland Lake, Great Lakes, Stream, River, Etc.)?

Although there is extensive appellate case law in Michigan regarding riparian and littoral rights as it relates to inland lakes versus flowing bodies of water (lakes, streams, creeks, brooks, etc.) versus the Great Lakes and distinctions are made regarding such rights depending on the type of body of water involved, ML&SA could not find any Michigan case law which expressly discusses whether easement rights and uses are affected by the type of body of water involved.

Anecdotally, it would make sense to accord slightly different easement usage rights where the Great Lakes are involved versus an inland lake, even where the same easement

language is used. It is logical that language contained in easements involving inland lakes would be more strictly construed against expansive usage rights than easements involving the Great Lakes, given the character of common everyday usage. For example, shorelines along the Great Lakes (excluding those channels, bays, rivers, smaller inland lakes, etc. which are adjacent to or are used to access the Great Lakes) tend to be used recreationally for more passive activities such as swimming, lounging, and sunbathing, as well as occasional picnicking and playing volleyball or similar activities. Private docks, wharfs, or piers are exceedingly rare, and in most places, boats are not kept on the shoreline or moored in the lake overnight. A significant number of people can engage in swimming, sunbathing, and lounging in a given area with normally minimal conflict. The situation is quite different regarding easements on most inland lakes. Such easements tend to be relatively narrow. Invariably, the beneficiaries of easements on inland lakes desire to install dockage and utilize permanent boat mooring (often involving multiple boats), as well as engage in sunbathing and lounging. Very rarely can such activities by the various easement beneficiaries be safely or practically accommodated within the narrow easement area. Furthermore, conflict often arises between the dockage and boating activities of the easement beneficiaries and similar uses by adjoining riparian property owners. Quite often, the various uses of the easement beneficiaries themselves are conflict—for example, it is difficult for easement beneficiaries to swim in a small area where other easement beneficiaries desire to utilize personal watercraft or speedboats with dangerous propellers. These problems are implicitly recognized by the extensive case law mentioned above regarding simple lake access easements (all of which case law deals with inland lakes).

C. The Impact of an Original Grantor Owning the Entire Body of Water and Surrounding Property

Absent relevant deed restrictions or covenants, ML&SA does not believe that whether or not one original grantor owned the entire body of water and surrounding property is relevant to determination of the issues in this case.

D. The Status of the Body of Water as Privately or Publicly Owned

Although lay people tend to talk about "private" and "public" lakes, the law does not appear to so formally define or differentiate lakes. In the common vernacular, a lake could be considered "private" if there is no public access site located on the lake or if no public property exists on the lake. However, other people might consider a lake to be "private" only if it is owned entirely by one person.

ML&SA does not believe that whether a lake is considered private or public is determinative of the issues in this case.

III. CONCLUSION

ML&SA respectfully requests that the Michigan Supreme Court hold as follows in this case:

A. That the Court of Appeals should be reversed and that the trial court was correct in granting summary disposition in favor of Plaintiffs/Appellants since the phrase "and use of the riparian rights" is of no effect such that the long-established common law regarding simple lake access easements applies and the easement beneficiaries can have no dockage, permanent boat moorage, sunbathing, or lounging rights.

B. Alternately, confirm that for simple lake access easements, no dockage, permanent boat moorage, lounging, etc. is permitted and such cases can be decided at the trial court level as a matter of law. To the extent that the opinion of the Court of Appeals in *Little* v *Kin* is valid at all, parol and extrinsic evidence should be permitted only where one or both of the following are present:

- The easement language contains wording in addition to simple travel or access language.
- The easement language contains wording that is on face ambiguous.

Respectfully submitted,

LAW, WEATHERS & RICHARDSON, P.C.

Dated: January 14, 2003

By _____
Clifford H. Bloom (P35610)
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EXHIBIT A

04351

STATE OF MICHIGAN

COURT OF APPEALS

'RANCIS MILLER and KEITHA MILLER,

Plaintiffs-Appellants,

DEC 27 1989

No. 111358

ARRY PETERSEN, SHARON PETERSEN, DELBERT ULHOLLAND and SUSAN MULHOLLAND,

Defendants-Appellees.

efore: Maher, P.J., and Holbrook, Jr. and Sawyer, JJ.

ER CURIAM.

Plaintiffs appeal as of right a judgment of the trial ourt denying plaintiffs' request for injunctive relief and ssessing costs to plaintiffs. We reverse.

Plaintiffs own Lots 77 and 78, which abut Clifford ake. Defendants Delbert and Susan Mulholland own Lots 20 and 1; defendants Larry and Sharon Petersen own Lots 22 and 23. hese four lots do not abut the lake, but are in a back tier of ots.

An easement was created on Lot 77 for the benefit of ots 20, 21, 22 and 23. As expressed in the deed for Lot 77 hich was encumbered with the easement, the stated purpose of the asement was for ingress and egress to Clifford Lake, without the ight to drive on the easement with motor vehicles.

Some witnesses testified that from 1959, when the asement was created, until 1962, a dock existed at the end of he easement. Plaintiffs did not recall a dock at the end of the asement.

Plaintiffs Miller, the present owners of Lot 77, filed complaint on August 17, 1987, seeking an injunction to forbid efendants from building a permanent dock at the end of the asement. A non-jury trial was held on August 1, 1988. The ourt found that the easement was granted for access to the lake, hich implied a right to enter the water for swimming and boating

which implied a right to build a dock. Additionally, the court held that the easement created a riparian right which conferred upon defendants the right to erect a dock.

The sole issue on appeal is whether the trial court erred when it held as a matter of law that an easement of a backlot owner for ingress and egress to a lake afforded the backlot owner riparian rights that would allow the permanent placement of a dock at the terminus of the easement.

Plaintiffs claim that the trial court erred when it held as a matter of law that the easement granted to backlot owners for ingress and egress to a lake gave those backlot owners riparian rights that would allow them to place a permanent dock at the terminus of the easement. We agree.

The Supreme Court succinctly set forth applicable law in Thies v Howland, 424 Mich 282, 287-288; 380 NW2d 463 (1985):

> Land which includes or is bounded by a natural watercourse is defined as riparian. Persons who own an estate or have a possessory interest in riparian land enjoy certain exclusive rights. Thompson v Enz, 379 Mich 667, 677-679; 154 NW2d 473 (1967) (opinion of KAVANAGH, J.) These include the right to erect and maintain docks along the owner's shore, Hilt v Weber, 252 Mich 198, 226; 233 NW 159 (1930); Thompson Real Property (1980 Replacement), §§ 174, 280, pp 453-454, 506-507; 3 American Law of Property, § 15.35, pp 874-875, and the right to anchor boats permanently off the owner's shore. Hall v Wantz, 336 Mich 112, 117; 57 NW2d 462 (1953). Nonriparian owners and members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. Delaney v Pond, 350 Mich 685, 688; 86 NW2d 816 (1957); Hall, 336 Mich 116-117. (Footnotes omitted.)

Reservation of a right-of-way for access to a watercourse cannot and does not give rise to riparian rights but only to a right-of-way. Thompson v Enz, 379 Mich 667, 685; 154 NW2d 473 (1967). The use of an easement must be confined strictly to the purposes for which it was granted. One of the principles underlying the use of all easements is that its owner cannot materially increase the burden of the easement on its servient estate or impose a new burden. Delaney v Pond, 350 Mich 685, 687; 86 NW2d 816 (1957).

Here, the deed stated that the easement was for ingress and egress to the lake, and precluded the use of motor vehicles on the right-of-way.

The court found as a matter of law that the expressed easement gave defendants riparian rights and that those riparian rights included the right to build a dock, citing Tennant v Recreational Development Corp, 72 Mich App 183; 249 NW2d 348 (1976), as authority. This was error.

The trial court's reliance on Tennant is misplaced. Tennant concerns the rights of riparian owners. Tennant, supra, 185. Defendants are not riparian owners. An easement given to several backlot owners for access to a lake does not give rise to a right to build a dock or permanently moor a boat at the end of that easement. Thies, supra, 297.

Defendants also argue that there had been a dock at one time at the terminus of the easement. Defendants claim that Thies supports the right to build a dock, where it is shown that the plattor so intended. Thies, however, concerned a public right-of-way given to all subdivision owners by the plattor. Thies is distinguishable from the instant action which only concerns the owners of four lots.

Whether the public has the right to erect and maintain a dock depends on the scope of the dedication of the property in question. Thom v Rasmussen, 136 Mich App 608, 612; 358 NW2d 569 (1984). In the instant action, the easement was created for access to the lake, which cannot be expanded to include the building of docks. Delaney, supra, 687.

Hence, the trial court erred as a matter of law when it determined that the easement granted to defendants gave riparian rights to those defendants, including the right to build a dock at the terminus of the easement.

Reversed.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.
/s/ David H. Sawyer

include the dock being put in.

I think the easement gives the Petersens and the Mulhollands the right to go to the lake and the riparian right to put a dock there, because it was in the intent, and they should be permitted to put a dock in.

THE COURT: I would like to review a couple of cases. On the last recess I was involved in something else. So we'll be in recess until 10:30.

(Brief recess)

THE COURT: This case was brought before the Court on a question of the right of beneficiaries of an easement granting access to the shore of Clifford Lake, whether or not they have the right to build a dock at the easement facing the lake, as it touches the lake, and part of the question and problem I see before the Court is to determine the intent of the parties in several conveyances that have been put into evidence.

The easement granted in the deed says specifically that it is a means of ingress and egress to Clifford Lake, but without the right to drive thereon with motor vehicles. Exactly what does this mean, and does this establish any riparian rights?

It seems to me, if we look at all the common sense approaches to what this egress granted, is it would be for access to use of the lake. There would be no

point, I would suggest, for the intent of the parties that merely people could walk down and look at the lake. It would imply the right to enter into that lake for the purpose of what lakes are used, and they are primarily used for swimming and boating, so it seems to me the clear intent was to give them access for the purpose of using the lake, which would be for the purpose of swimming and boating.

Now, does this give us a right to build a dock for the purpose of exercising that right of swimming and boating? It would make no sense to me, I would think, that if you could not put the boat either into the lake from that point or to use it there, that the easement would be useless as to the boating rights that you would have on a lake. You would have to go somewhere else to bring the boat to the lake, and it would have no meaning for that purpose.

I read the cases referred to in the briefs. The McCartle case involved a public boulevard between the lakefront owners and I believe Higgins Lake and the back lot owners. In that case they were attempting to build docks because it was a public boulevard, and the Court did not grant any rights of that. But there were no easements involved such as we have here, so I have distinguished that.

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It seems to me the case on point with the present case is that of Tennant v Recreational Development Corporation 72 Mich App 183. If we determine -- and I do find as a matter of law that there are riparian rights because of the specific granting of the easement to the original parties and their successors in interest -- that there is such an expressed easement and that the riparian rights occur. In connection with that, the Court of Appeals in the Tennant case said the rights associated with riparian ownership generally include the right of access to navigable water, the right to build a pier out to the line of navigability.

It's an important part here that the boats are not of any size and are not generally usable unless we have a dock to tie them to because, of course, there is shallow water right at the beach. So the right to build the pier out to the line of navigability would seem to me the right to build a dock.

Another right is the reasonable use of the water for general purposes such as boating and domestic use and so on, and they were relying on and old Michigan Supreme Court case of Hilt v Webber, which I believe is at 252 Mich 198.

Also in that case they referred to a Wisconsin Supreme Court Case which held that a littoral proprietor,

like a riparian proprietor, has a right to the water frontage blocking by nature his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for purposes of using the right of navigation. This right is his only and exists by virtue and in respect of his riparian proprietorship.

So the easement creates a riparian right. To that extent, you would have a right to erect a dock within the 10-foot easement as described in the deeds.

I'm going to return the exhibits to the parties which produced them.

MR. SKINNER: I think we can divide them.

(End of proceedings)

CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF KENT)

I certify that this transcript, consisting of 49 pages, is a complete, true, and accurate transcript of the proceedings held in this cause on the 1st day of August, 1987, before the Honorable Charles W. Simon, Jr., Circuit Judge.

IN WITNESS THEREOF, I have hereunto set my hand this 13th day of September, 1988.

DALE J. LALKA, Certified Shorthand Reporter
and Notary Public for Kent County, Michigan
My Commission expires: October 21, 1991

(LAST PAGE)

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

DONALD R. KRAUSE and BEVERLY KRAUSE,

Plaintiffs-Appellants,

v

KEELER TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
July 28, 2000

No. 220692
Van Buren Circuit Court
LC No. 98-044325-CH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the Van Buren Circuit Court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of an ordinance defendant adopted that allegedly infringed upon plaintiffs' use and enjoyment of their lakefront property easement located on Round Lake.

In 1974, defendant township acquired ownership of property on Round Lake subject to all recorded encumbrances. In 1989, plaintiffs acquired property near Round Lake. Conveyed with plaintiffs' property was an easement over defendant's Round Lake property that gave plaintiffs the right to use the easement for "bathing beach and park purposes." Plaintiffs docked and moored boats on the easement property as well as maintained and erected docks and piers.

In 1997, defendant adopted Ordinance No. 97-1, the Keeler Township Public Property Boat Launching and Docking Regulation Ordinance, which essentially prohibited 1) the overnight storing or keeping of boats on a lake or shore adjacent to a separate frontage except a privately-owned separate frontage; and 2) the placing, using, or maintaining of docks and moors that abut a public access site.

In response to defendant's enforcement of the ordinance against plaintiffs, plaintiffs filed a complaint in Van Buren Circuit Court alleging constitutional violations as well as an adverse possession claim. Plaintiffs claimed that the ordinance was unconstitutional and that its enforcement constituted a taking in violation of their due process rights.

Defendant sought summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that plaintiffs' easement did not contemplate the docking and mooring of boats on the lake or the using, maintaining, or erecting of docks and piers. Additionally, defendant argued that no such rights were acquired by adverse possession. Last, defendant asserted that the ordinance was validly adopted pursuant to the township ordinance act, MCL 41.181; MSA 5.45(1). The trial court agreed and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

We review de novo a trial court's grant or denial of summary disposition based on MCR 2.116(C)(10). *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686; 594 NW2d 447 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) will be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This Court must consider the pleadings, affidavits, and other documentary evidence in the same manner as the trial court and in a light most favorable to the nonmoving party. *Clark, supra* at 686; see also MCR 2.116(G)(5).

On appeal, plaintiffs argue that summary disposition was improper because there were questions of fact regarding the nature and extent of plaintiffs' easement rights and interests. We disagree.

As a general rule, riparian owners enjoy certain exclusive rights including the right to anchor boats permanently off the owner's shore. *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). On the other hand, nonriparian owners and the public only have a right to use the surface of the water in a reasonable manner. *Id.* Additionally, Michigan law has held that a holder of an easement that makes contact with a navigable body of water is not a riparian land owner. Thus, a nonriparian easement holder only has a right to use the surface of the water in a reasonable manner. *Id.* at 289, 293-294. However, this does not mean that a nonriparian easement holder may never enjoy rights similar to that of a riparian land owner. To determine if a nonriparian easement holder, such as plaintiffs, is entitled to use the easement for the docking and mooring of boats as well as the construction or maintenance of piers, in essence, rights typically enjoyed by riparian owners, this Court must determine if these activities are within the scope of plaintiffs' easement. *Id.* at 289, 294.

The Michigan Supreme Court has clearly held that "[t]he use of an easement must be confined strictly to the purposes for which it was granted" so to not impose an additional burden upon the servient estate. *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Additionally, easements created to provide access to a navigable body of water have been strictly construed to provide no rights to permanently moor or dock boats or erect docks or piers. *Thies, supra* at 294-295; *Delaney, supra* at 687-688.

The express language of plaintiffs' easement gives plaintiffs the right to use the easement for "bathing beach and park purposes." Bathing beach and park purposes would include activities such as swimming, sunbathing, fishing, and picnicking. Bathing beach and park purposes could not reasonably provide plaintiffs with the additional rights to moor or dock boats in the lake or on the shore or erect piers or docks. Interpreting the language to include these activities would impermissibly impose an additional burden upon the servient estate.

Additionally, we note that plaintiffs failed to assert, on appeal, that they had acquired the aforementioned rights by either "adverse possession" or "prescription." No argument will be considered which is not set forth in the statement of questions involved. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

We further find that the nature and scope of plaintiffs' easement is dispositive of plaintiffs' appeal. Therefore, we need not address the remaining issues raised by plaintiffs, especially the constitutional issues. *Detroit v Sledge*, 223 Mich App 43, 47; 565 NW2d 690 (1997). Because plaintiffs did not have the right to permanently moor boats and erect docks or piers under the language of their easement, they were not deprived of a property right in this regard.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Brian K. Zahra

EXHIBIT C

STATE OF MICHIGAN

COURT OF APPEALS

JOHN H. TRUSTDORF and MARY JANE TRUSTDORF,

Plaintiffs-Appellees,

v No. 103109

MARTHA C. CLOUGH BENSON,

Defendant-Cross-Plaintiff-Appellant,

v

GEORGE S. LILLY and DOROTHY L. LILLY,

Cross-Defendants-Appellees,

and

FENTON S. HALL, DOROTHY L. HALL, KENNETH E. BRODEUR, and ORMA D. BRODEUR,

Cross-Defendants.

Before: Maher, P.J., and Holbrook, Jr., and Sawyer, JJ.

PER CURIAM.

Defendant Benson appeals from a judgment of the circuit court finding that a portion of her property was burdened with an easement appurtenant for the benefit of property owned by plaintiffs and determining how plaintiffs could use that easement.[1] We affirm in part and reverse in part.

This dispute involves certain lots in a plat known as Pennington Park located on the north shore of Crystal Lake in Benzie County and which had been established by a plat filed in the mid-1950s. Specifically, defendant Benson owns lots 18a, 19a and 20 (except for the west thirty-five feet) which are lakefront lots; plaintiffs own the east seventy-five feet of the west one hundred feet of lot 19, which is a back lot catty-cornered across the street from Benson's property.[2]

This dispute centers on the status of lots 18a and 19a and a reference to those lots in the recorded plat. In the recorded plat, following the typewritten description of land

platted there is a hand-lettered provision which states, in pertinent part, that "Lots 18 A and 19 A being right of way to lake for lots 18 and 19 respectively." Lots 18a and 19a were unusual in that each was only twenty-five feet across and could not have been used separately for residential purposes. The trial court determined that lot 19a of the plat was a right of way to Crystal Lake for the benefit of plaintiffs as owners of the east seventy-five feet of the west one hundred feet of lot 19.[3] The trial court further determined that a shed which had been constructed on lot 19a constituted an encroachment which limited the uses of the right-of-way by plaintiffs. Specifically, the trial court determined that lot 19a could be used as a right-of-way for swimming, sunbathing, installation of a single dock and hoist, the clearing of a path east of a beach house in order to make use of a beach area, including access to the dock and for boat launching, reasonable grooming of the beach area, and such other rights as are necessary for the enjoyment of the specifically enumerated rights or those reasonably implied by such rights.

Defendant first argues that the trial court erred in granting an easement on the basis of the handwritten alteration to the plat where plaintiffs did not present evidence indicating that the alteration was present at the time that the owner that incorporated the platted land signed the instrument. We disagree.

The trial court specifically found that the hand-lettered notations establishing lots 18a and 19a as rights-of-way were present on the plat prior to its being recorded and were either on the plat when signed by the proprietors or were known to and ratified by the proprietors prior to recording. We review the findings of fact of a trial court to determine if those findings are clearly erroneous. MCR 2.613(C); Holland v Michigan Nat'l Bank-West, 166 Mich App 245, 261; 420 NW2d 173 (1988). The

trial court's finding was supported by the evidence presented below.

First, the hand-lettered notation concerning the rights-of-way are not the only hand-lettered notations on the plat. Two certified copies of the plat were offered into evidence, one as a true copy of the plat filed with the auditor general's office and the other a certified copy of the plat recorded in the register of deeds office, both of which were identical and contained the same hand-lettered notations. Furthermore, a land surveyor testified on behalf of plaintiffs and stated that it was not unusual to find hand lettering on plats and, more particularly, that he was familiar with the work of the surveyor who had done the plat at issue and believed the handwritten notations to be that surveyor's lettering. In light of this evidence, we cannot conclude that the trial court clearly erred in finding that plaintiffs had proved by a preponderance of the evidence that the hand-lettered notations on the plat were properly part of the plat and were on the plat prior to recording.

Defendant next argues that the circuit court erred in granting an easement over a privately owned lot on the sole basis of a reference in a plat. We disagree. It is well settled that an easement recorded on a subdivision plat by reference to which subdivision sales are thereafter made is binding on the landowners. See Jeffery v Lathrup, 363 Mich 15, 21-22; 108 NW2d 827 (1961). Accordingly, the reference in the plat in the case at bar was sufficient to establish the easement or right-of-way at issue.

Next, defendant argues that the trial court erred in determining that there had been no express abandonment of the easement. We disagree. The evidence which defendant relies upon to establish an abandonment is the testimony by Harlan Mills, who in 1964, in separate transactions, bought the property currently

ned by cross-defendants Lillys (lot 18 plus portions of lot 19 d 20) and thereafter the property owned by plaintiffs and oss-defendants Halls (the remainder of lot 19). Defendant gues that the fact that Mills purchased the west thirty-five et of lot 20 to provide access to the lake as well as Mills' stimony that he wasn't concerned with the easements over lots a and 19a indicates that Mills intended to abandon his easement ghts. The trial court did not accept Mills' testimony as tablishing an abandonment of the easement and we agree.

First, it is not clear from Mills' testimony that he sitively intended to abandon any easement or right-of-way ights to lots 18a or 19a, merely that he wasn't concerned with nether he had easement rights in light of the fact that he owned portion of lot 20. Moreover, his purchase of a portion of lot 0 does not establish an abandonment with respect to plaintiffs' ights of easement or right-of-way through lot 19a because, at he time Mills purchased that portion of lot 20, he had not yet urchased the remainder of lot 19 in which plaintiffs' property s located. Thus, even if the purchase of the strip of lot 20 stablishes an abandonment of the easement, it does so only with espect to lot 18a and, possibly, the interests in an easement to ot 19a in the owner of the west twenty-five feet of lot 19 as he dominant estate, namely, the Lillys. The easement interests f the owners of the remainder of lot 19, including plaintiffs, would be unaffected.

Second, even if Mills' conduct establishes an abandonment to the easement of both 18a and 19a, such abandonment is ineffectual since the right of easement had been established in the plat itself. Specifically, once a plat is recorded, the right to vacate, correct, or revise a recorded plat vests in the circuit court. See MCL 560.221; MSA 26.430(221) [formerly MCL 560.59; MSA 26.489]. Since the plat was never so amended, plaintiffs were entitled to rely upon the plat in believing that

they had an easement or right-of-way across lot 19a.

Next, defendant argues that the trial court erred in ruling that the easement included the right to install a dock and boat hoist. We agree. The right to construct a dock or to permanently anchor a boat off shore is a riparian right. Thies v Howland, 424 Mich 282, 288, 294; 380 NW2d 463 (1985). An easement or right-of-way does not give rise to riparian rights unless the plat's dedication of the easement or right-of-way or the grant of the easement or right-of-way evidences an intent to grant a specific riparian right, such as the construction of docks. Thies, supra at 294-295; Thompson v Enz, 379 Mich 667, 685; 154 NW2d 473 (1967). The language in the plat dedication which establishes the right-of-way only establishes lots 18a and 19a as rights-of-way to the lake for lots 18 and 19, respectively. Nothing in the language on the plat establishes the grant of any riparian rights in connection with those rights-of-way. Accordingly, we conclude that the trial court erred in determining that plaintiffs enjoyed any riparian rights to the right-of-way on lot 19a, specifically the right to erect a dock and boat hoist. Accordingly, that portion of the trial court's judgment is vacated.

Finally, defendant frames as a separate issue an argument that the interests of justice and equity strongly favor her rather than plaintiffs. This issue is not a claim of specific error, but a general plea for this Court to "do equity." We have endeavored to do so and see no need to change our analysis on any of the issues.

Affirmed in part and reversed in part. No costs, neither party having prevailed in full.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.
/s/ David H. Sawyer

[1] Cross-defendants Lillys had also filed a claim of appeal, Docket No. 103143, but that appeal was dismissed for lack of progress on May 12, 1989.

[2] Cross-defendants Lillys own lot 18, which is a back lot directly across the street from Benson's property, the west twenty-five feet of lot 19, which is contiguous to lot 18, and the west thirty-five feet of lot 20, which, as noted above, has lake frontage. The status of cross-defendants Lillys' rights is not directly at issue in this appeal.

[3] The judgment further provided that cross-defendants Lillys, Halls, and Brodeurs were barred from any use of lot 19a. The Halls own the portion of lot 19 to the east of the Trustdorfs and both the Halls and the Trustdorfs claim title to their property through the Brodeurs.

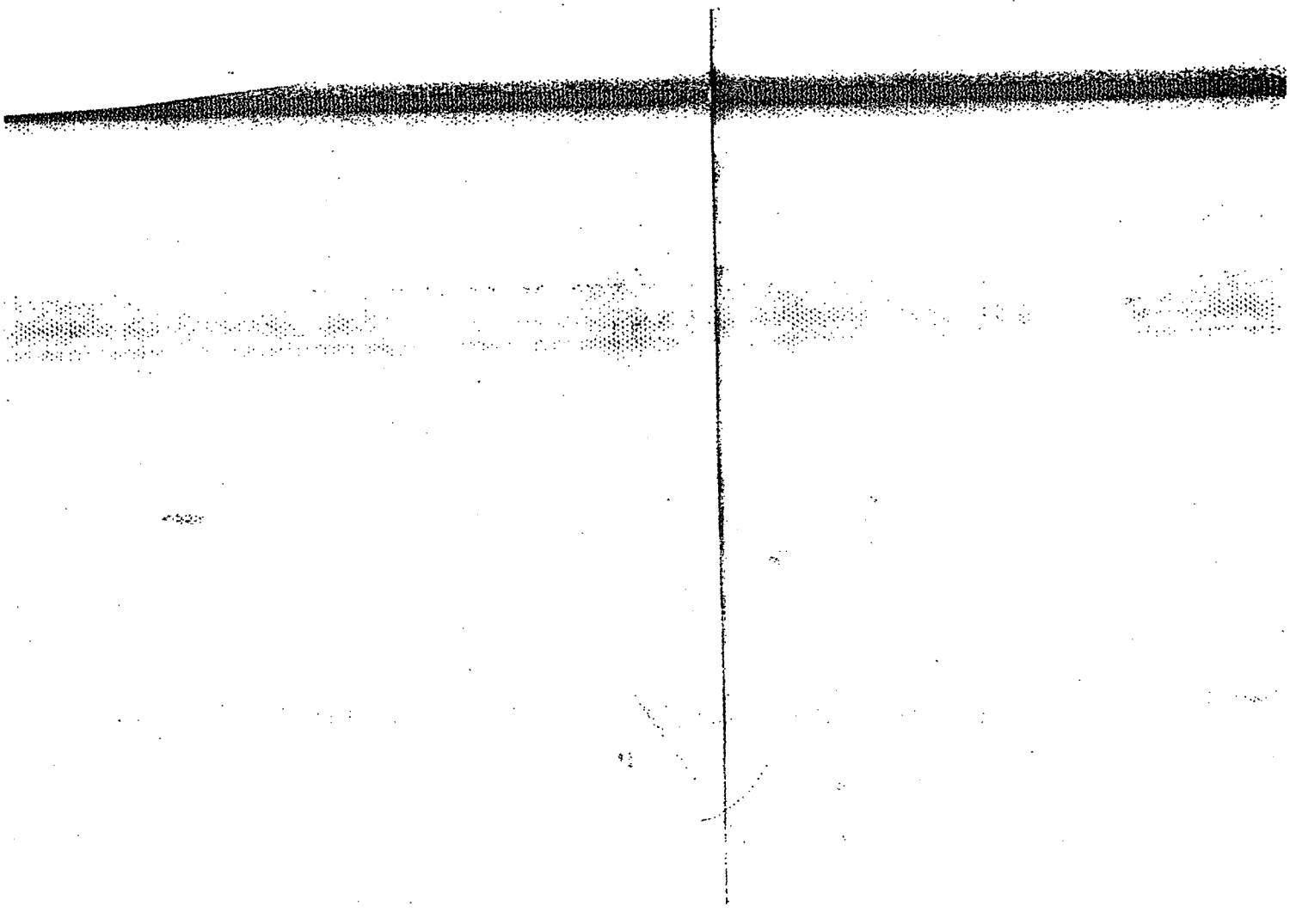

EXHIBIT D

STATE OF MICHIGAN

COURT OF APPEALS

DEMPSEY GROSS and JOANN GROSS,

Plaintiffs-Appellees,

v

DICK MILLS,

Defendant-Appellant,

and

DIANE MILLS,

Defendant.

UNPUBLISHED
September 28, 1999

No. 211776
Cass Circuit Court
LC No. 97-000551 CZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

In this action involving a dispute over defendants' use of a ten-foot-wide strip of land for lake access, defendant Dick Mills ("Mills") appeals as of right from an order granting summary disposition in favor of plaintiffs. We affirm.

I

In December 1992, in a previous lawsuit between the parties, the trial court determined that plaintiffs were the fee owners of certain real property fronting Garver Lake and defendants had an easement over the westerly ten feet of the property, "to be used for access to and from the waters of Garver Lake." In that earlier lawsuit, plaintiffs filed a counterclaim, requesting, among other things, that defendants be prohibited from maintaining a pier or docking boats on the easement property; however, the court did not address these matters in its decision from the bench. When asked if the court had neglected anything, plaintiffs' counsel noted that the requests in the counterclaim had not been addressed, i.e., that defendants be ordered to keep the easement in a neat and sightly fashion and be prohibited from maintaining a pier. The court responded:

They haven't been, and I guess the reason for that is I haven't had any proofs on it, number one. Number two, I intentionally neglected to mention anything about that because, on purpose I guess, I wanted to let the dust settle from this determination and also give the parties an opportunity to try and patch things up here and live harmoniously. Now that they have their legal rights defined I would hope that they would be able under those circumstances to continue to coexist and that they would reach some accommodation that would of course still allow [defendants] to enjoy their easement and to gain access to the lake, since it's pretty important to them, and in particular Mr. Mills who does a lot of fishing, and to give them an opportunity to try and reach some accommodation.

If between now and judgment entry you continue to have further problems, they're not able to do that and you need some direction from the Court as far as the specific judgment language is concerned, you can come back to the Court and I'll be happy to address that. I would hope that they would be able to somehow work that out on their [own] in terms of the specific uses that it would be put, that the easement would be put.

On February 8, 1993, the court entered a final order adjudging ownership of the property and dismissing with prejudice the complaint and countercomplaint. The order made no mention of riparian rights or defendants' rights to construct or maintain a pier on the ten-foot strip of land. That order was affirmed by this Court on February 15, 1995. However, the dispute between the parties was not put to rest because subsequently they disagreed about defendants' use of the easement.

II

Plaintiffs filed the instant action on July 16, 1997, requesting a declaratory judgment determining that they own the riparian rights associated with the waterfront property and that defendants' use is limited to an easement for access to and from the lake and for enjoyment of the lake surface. Plaintiffs also sought a permanent injunction prohibiting defendants from constructing, installing or maintaining a dock or pier on the waterfront property; regularly anchoring or harboring boats there; altering the lake frontage and associated lake bottom area; or interfering with plaintiffs' use and enjoyment of their lake frontage and associated riparian rights.

After a series of motions and a hearing, the court determined that an evidentiary hearing was necessary to address whether plaintiffs' claim regarding the scope of the easement was barred by the doctrine of laches or whether defendants' existing use of the easement should continue under a theory of acquiescence or adverse possession.

Following the hearing, the court determined that neither acquiescence nor adverse possession applied in this case. First, because the dispute involved an easement, which is a permissive use, there was no basis for defendants' claim of adverse possession. Regardless, the claim failed because defendants did not establish the requisite fifteen-year period of continuous and uninterrupted use.

land. Plaintiff Dempsey Gross testified that after entry of that judgment, and particularly after the appeal to this Court, he cleaned up the property at issue and removed portions of the original walkway or pier installed by defendants. Subsequently, in 1997, defendants installed a section of replacement pier on the easement property, which prompted the current litigation. Thus, the need for further adjudication arose only because defendants asserted a postjudgment right to improve or replace the existing pier rather than merely use it.

IV

Next, Mills contends that because more than fifteen years have passed since defendants erected the pier, defendants have acquired a prescriptive easement, and plaintiffs are prohibited from bringing this action under MCL 600.5801; MSA 27A.5801, which establishes a fifteen-year period of limitations for the recovery of lands. MCL 600.5801(4); MSA 27A.5801(4). We disagree. "A prescriptive easement claimant must establish a use which is actual, open, notorious, continuous, and hostile for the statutory 15-year period. Mutual use of an area will not mature into a prescriptive easement until the mutuality has ended and the adverse and hostile use continues for the statutory period." *Williamson v Crawford,* 108 Mich App 460, 464; 310 NW2d 419 (1981); see also *Wood v Denton*, 53 Mich App 435, 441; 219 NW2d 798 (1974).

In this case, defendants apparently installed a "makeshift walkway" and pier on the riparian land in 1982, believing that they had purchased the ten-foot strip of land.[1] Plaintiffs purchased their lakefront property in 1990. A dispute then arose as to ownership of the strip of land. When defendants filed the 1991 lawsuit, plaintiffs filed a counterclaim objecting to the pier. Once the court determined that defendants held merely an easement, their use of property was permissive as to the deeded easement. Defendants cannot establish the statutory period of continuous use of the land for purposes beyond the deeded easement after 1992 because after the lawsuit, plaintiffs began removing the original walkway and pier material. Further, when defendants attempted to install the new section of pier in 1997, plaintiffs filed the instant action. Defendants did not acquire a prescriptive easement entitling them to erect a pier.

V

Finally, Mills contends that even if defendants have merely an easement in the riparian land, it does not preclude a finding that defendants have a right to erect a pier or permanently anchor boats. Persons who own riparian land enjoy certain exclusive rights, including the right to erect and maintain docks along the owner's shore and the right to permanently anchor boats off the owner's shore. *Hess v West Bloomfield Twp*, 439 Mich 550, 561-562; 486 NW2d 628 (1992); *Thies v Howland,* 424 Mich 282, 288; 380 NW2d 463 (1985). Unless the language granting an easement evidences otherwise, an easement in riparian land generally affords only the right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. *Id.* at 288-289.

Riparian land is defined as land which includes or is bounded by a natural body of water. *Id.* at 287-288; *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). As the fee owners of the ten-foot strip of riparian land, plaintiffs have the exclusive right to erect a pier along their shore and

permanently anchor boats off their shore, unless the specific language granting defendants' easement evidences otherwise. The trial court concluded that the language in defendants' deed, i.e., "to be used for access to and from Garver Lake," granted an easement for the purpose of ingress and egress but not for the purpose of constructing a pier or the permanent anchoring of boats. This finding is not clearly erroneous because the deed language "does not evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners." *Thies, supra* at 294; see *Dobie, supra* at 541 (the extent of a party's rights under an easement is a question of fact reviewed for clear error).

An easement holder's rights are defined by the terms of the easement agreement and must be confined to the purposes for which the easement was created. *Thies, supra* at 297. "A person entitled to the use of an easement cannot materially increase the burden upon the servient estate beyond what was originally contemplated." *Id.* Defendants' rights are limited to those determined by the trial court.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] Defendants did not testify at the evidentiary hearing; however, defendant Diane Mills' son testified regarding defendants' installation of the walkway and pier.

EXHIBIT E

STATE OF MICHIGAN

COURT OF APPEALS

MARTIN J. HAAG, WELDON FAIN and BILL WOOLWINE,

Plaintiffs-Appellants/Cross-Appellees,

V

ERNEST A. CALLARD, KATHY M. CALLARD, HOWARD DIEM, GLORIA DIEM, JANICE HOLBROOK, HUBERT M. JONES, FRANCIS L. JONES and MARK S. GATLIN,

Defendants-Appellees/Cross-Appellants,

and

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

UNPUBLISHED
February 15, 2002

No. 223658
Roscommon Circuit Court
LC No. 98-720283-CH

Before: Bandstra, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiffs, owners of two riparian lots on Houghton Lake in northern Michigan, appeal as of right from a declaratory judgment allowing nonriparian owners in their subdivision to place a dock and seasonally moor their boats offshore from a landing dedicated to the use of all subdivision residents. Defendants are nonriparian owners who used the landing for access to Houghton Lake.[1] Defendants cross-appealed arguing that the trial court should not have allowed plaintiffs to use the landing to access their properties and should not have limited most of defendants' uses of the landing to daylight hours. We affirm.

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[1] The Department of Environmental Quality initially was a named defendant in the action, but was dismissed from the case before trial. Accordingly, the term "defendants" refers only to the nonriparian owners.

Plaintiffs contend that the trial court erred in holding that permissible uses of the landing by the nonriparian subdivision residents included placement of a common dock offshore from the landing and the seasonal mooring of boats at the dock, and sunbathing, picnicking and swimming during daylight hours. The extent of a party's rights under an easement is a question of fact. Accordingly, this Court reviews for clear error the trial court's determination of the parties' respective rights under the easement. *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998).

Land that includes or is bounded by a natural watercourse is defined as riparian. *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985). Persons who own an estate or have a possessory interest in riparian land enjoy certain exclusive rights, including the right to erect and maintain docks along the owner's shore and the right to anchor boats permanently off the owner's shore. *Id.* at 288. Nonriparian owners who via an easement gain a "right of access" to a navigable body of water have the right to use the water for such activities as boating, fishing and swimming. *Delaney v Pond*, 350 Mich 685, 687-688; 86 NW2d 816 (1957). Unless specified otherwise, the nonriparian easement holder's right of access for boating encompasses the right to temporarily anchor boats within the easement area, but not the right to permanently store boats as the riparian owners are entitled to do. *Id.* at 688.

In determining the scope of permissible use by nonriparian owners, the intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant. *Dobie, supra* at 540. The extent of the nonriparian owners' dedicated use also may be determined according to the traditional and historical use of the easement area. *Id.* at 541-542.

The instant grantors significantly employed the word "landing" in their dedication. Black's Law Dictionary defines the word "landing" in relevant part as follows:

> 1. A place on a river or other navigable water for loading and unloading goods, or receiving and delivering passengers and pleasure boats. 2. The termination point on a river or other navigable water for these purposes. [Black's Law Dictionary (7th ed), p 883.]

The general rights and prohibitions incident to the use of a landing are set forth in American Jurisprudence 2d as follows:

> The public easement of navigation is not limited to the passage and repassage of ships with their goods, but includes incidental rights, such as those of stopping, anchoring, and the like, although not to the extent of obstructing navigation. The right to moor boats and other craft at well-known or accustomed landings and wharves on a stream is as well secured and protected by law as that of actual navigation. In such case, however, the owner or person in control is bound to leave sufficient room for the passage of other craft, and also to exercise reasonable care to prevent injury thereto or interference in other respects with the rights of other persons. [70 Am Jur 2d, Shipping, § 639.]

At trial, none of the parties presented evidence of facts or circumstances existing at the time the grantors dedicated the landing. Testimony regarding one grantor's actions in the years

following the dedication, however, suggested that he continued to live in the subdivision for an unspecified number of years following the dedication and did not object to the placement of a dock and the mooring of boats offshore from Center Landing. This evidence raised the reasonable inference that the grantor would have made it known if the subdivision residents were behaving in a manner inconsistent with his intent at the time of dedication. In light of this evidence and the grantors' selection of the word "landing," we cannot characterize as clearly erroneous the trial court's finding that the grantor intended the dedication to include the right to erect a dock and seasonally moor boats offshore from Center Landing. Furthermore, in light of the testimony at trial regarding the longstanding traditional and historical use of Center Landing as a picnic and recreation spot, the trial court did not clearly err in finding that the nonriparian residents of Westfall Heights were entitled to picnic, swim and sunbathe there. *Dobie, supra* at 541.

Defendants argue that the trial court erred when it found that plaintiffs could use the landing "as their private driveway and parking area." Defendants misstate the trial court's judgment, however, which provided only that plaintiffs "may access their respective properties through Center Landing." With respect to the trial court's finding that plaintiffs had the right to access their parcels by driving across Center Landing, we cannot conclude that the trial court clearly erred in light of the trial testimony that plaintiffs, previous riparian lot owners and their guests had driven across Center Landing for many years. *Dobie, supra.*

Defendants lastly assert that the trial court erred by limiting certain uses of the landing to daylight hours. Besides requiring that the use of an easement fall within the scope of a plat's dedication, Michigan courts also have demanded that any permitted uses not unreasonably interfere with the adjoining lot owners' use and enjoyment of their properties. *Dobie, supra; Thies, supra* at 289. In this case, we find no clear error in the trial court's restrictions of sunbathing, picnicking, swimming and parking to daylight hours. The daylight use restriction imposed by the trial court struck a reasonable balance between the nonriparian owners' rights to use Center Landing as the grantors intended and plaintiffs' entitlement to use and enjoy their properties.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

EXHIBIT F

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT E. HOISINGTON and JOAN A. HOISINGTON,

Plaintiffs/Counter-Defendants/Appellants,

v

VERNA PARKES,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
March 12, 1999

No. 204515
Lenawee Circuit Court
LC No. 96-007165 CH

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiffs appeal by right a bench trial verdict in favor of defendant in this real property action. On appeal, plaintiffs argue that the trial court erred in finding that the easement plaintiffs' predecessors in interest granted to defendant permits defendant to construct a dock and permanently moor a boat in the water at the terminus of the easement. We reverse.

Plaintiffs own Lot 14 in the Plat of Kennedy, Franklin Township, Lenawee County, Michigan. This lot borders Sand Lake. Defendant owns a back lot which does not border the lake. Defendant holds an easement over a portion of plaintiffs' property that allows her access to the lake. When defendant constructed a dock and boat hoist at the terminus of the easement, plaintiffs brought suit seeking to enjoin her from constructing a dock or permanently mooring a boat at this site. Following a bench trial, the trial court found that the easement permitted defendant to construct a dock and permanently moor a boat at its terminus, but it did not permit her to construct a boat hoist.[1]

"This Court reviews equitable actions under a de novo standard. We review for clear error the findings of fact supporting the decision," including the extent of the parties' respective rights under an easement. *Dobie v Morrison*, 227 Mich App 536, 541-542; 575 NW2d 817 (1998); *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

Plaintiffs first argue that the trial court erred in holding that the easement permitted defendant to construct a dock and permanently moor a boat at the terminus of the easement. We agree.

The easement provides:

> An easement and right of way over and across a strip of land of the uniform width of 10 feet, Northwest to Southeast from off and across the Southeast side of Lot 14 on the Plat of "Kennedy", according to the recorded plat thereof, being a part of the Northwest Quarter of Section 7, Town 5 South, Range 3 East, for the use of said Grantees and their guests and successors in title as a means of ingress and egress to and from the shore and water of Sand Lake. Said land to be used for travel by pedestrians and for the movement of boats to and from said Lake but in no event to be used for motor vehicle traffic or parking purposes.

Defendant argues that the easement granted her riparian rights that permit her to place a dock and permanently moor one boat in the water at the terminus of the easement. Alternatively, defendant argues that the grantors, plaintiffs' predecessors in interest, intended that she be allowed to place a dock and permanently moor a boat at the terminus of the easement. We disagree.

"Land which includes or is bounded by a natural watercourse is defined as riparian. Persons who own an estate or have a possessory interest in riparian land enjoy certain exclusive rights. These include the right to erect and maintain docks along the owner's shore, and the right to anchor boats permanently off the owner's shore" (citations omitted). *Thies v Howland,* 424 Mich 282, 287-288; 380 NW2d 463 (1985); cf. *Thom v Rasmussen,* 136 Mich App 608, 612; 358 NW2d 569 (1984). Riparian rights "are appurtenant only to lands which touch on the water course . . . not to any lands physically separated from the stream and the land bordering on it." *Thompson v Enz,* 379 Mich 667, 678; 154 NW2d 473 (1967) (emphasis deleted). Our Supreme Court in *Thompson, supra* at 686, held that

> riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural water course.
>
> While riparian rights may not be conveyed or reserved—nor do they exist by virtue of being bounded by an artificial water course—easements, licenses and the like for a right-of-way for access to a water course do exist and ofttimes are granted to nonriparian owners.

Because defendant's parcel does not touch the shore of Sand Lake, it is not riparian, and defendant accordingly has no riparian rights to Sand Lake. *Thies, supra;* see also *Dobie, supra* at 539 (property separated from a body of water only by a right of way may have riparian rights while others authorized to use the right of way merely possess an easement). An easement or right of way does not give rise to riparian rights unless the grant of easement or right of way evidences an intent to grant a specific riparian right, such as the construction of docks. *Thies, supra* at 294-295; see also *Thompson, supra* at 685.

The intent of the plattors or grantors in conveying an easement should be determined with reference to the granting language used in connection with the facts and circumstances that existed at the time of the grant. *Thies, supra* at 293; *Dobie, supra* at 540.

> The use of an easement must be confined strictly to the purposes for which it was granted or reserved. A principle which underlies the use of all easements is that the owner of the easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. [*Delaney v Pond,* 350 Mich 685, 687; 86 NW2d 816 (1957).]

In the present case, the easement was granted "*for the use of* said Grantees and their guests . . . as a means of ingress and egress to and from the shore and water of Sand Lake. Said land to be used for travel by pedestrians and *for the movement of boats to and from said Lake but in no event* to be used *for* motor vehicle traffic or *parking purposes*." [Emphasis added.] Despite defendant's contention, "the term 'joint use' standing alone does not evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners." *Thies, supra* at 294. Moreover, the easement language specifically permits the easement holders to use the easement for moving their boats to and from the lake, but it is silent regarding the mooring or docking of boats. Thus, we find no reservation of docking rights, which are unquestionably rights inherent in riparian ownership. *Thies, supra* at 287-288. One could also read the prohibition against "parking purposes" as evidencing that neither cars nor boats should permanently or temporarily be left on or at the easement. And, clearly, nothing in the easement language establishes the grant of any riparian rights in connection with the easement.

Rather, the deed states that the easement is to be used for ingress and egress to the lake by pedestrians who may also move boats across the easement to the water but are not to drive or park on it. Incidental to this access, defendant may also hand-carry a boat across plaintiffs' property. Because (1) defendant is not a riparian owner, (2) the easement gives her the right to *use* a portion of the grantors' parcel, and (3) "use" does not generally evidence an intent to grant riparian rights, such as the right to construct a dock or permanently moor a boat in the water, we hold that the easement does not give defendant the right to construct a dock or permanently moor a boat at the terminus of the easement. Defendant "cannot store [her boat] permanently on the easement way, nor attach [it] to stakes driven into the land" in light of the easement's clear language. *Delaney, supra* at 688.

Plaintiffs also argue that the trial court erred in finding that use of the easement was exclusive to defendant and the Jewells. We agree. The language of the easement itself clearly sets forth that the easement is for ". . . the use of said Grantees and their guests and successors in title. . .." Moreover, the owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the rights of the easement owner. *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 300; 346 NW2d 92 (1983). Accordingly, we hold that the trial court's finding that the use of the easement was exclusive to defendant and the Jewells was clearly erroneous.

Our resolution of the above issues renders moot plaintiffs remaining arguments on appeal, and we therefore find it unnecessary to address them.

We reverse.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Plaintiffs' predecessors in interest granted an identical easement to the Jewells. While the Jewells are not parties to the instant suit, the trial court determined that they, along with defendant, could permanently moor one boat to the dock. Only one dock, however, could be installed at the terminus of the easement at any given time.

EXHIBIT G

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM EVANS and MAXINE EVANS,

Plaintiffs-Appellees,

v

DAVID GABRIEL and WENDY GABRIEL,

Defendants-Appellants.

UNPUBLISHED
December 28, 1999

No. 212759
Kent Circuit Court
LC No. 96-001350 GC

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition in favor of plaintiffs. We affirm.

In 1988, plaintiffs owned two parcels of property. Parcel one consisted of lots 57 and 58. Parcel one was located on Big Brower Lake, and a home was also located on the property. Plaintiffs also owned parcel two which consisted of lots 127, 128, 129, and 130. These "back lots" were located across the street from parcel one. In 1988, plaintiffs sold parcel one to a third party. In order to retain access to Big Brower Lake from parcel two, plaintiffs created an easement. Specifically, an easement was created over the north ten feet of lot 57 for the benefit of lots 128, 129, 130, and the north seven feet of lot 127. This easement was executed and recorded. Defendants ultimately purchased parcel one and erected a dog pen which allegedly encroached upon plaintiffs' easement. Plaintiffs filed suit to enforce their easement. Defendants asserted that plaintiffs' easement was invalid because it was created in violation of a local zoning ordinance. The trial court held that plaintiffs had not violated the zoning ordinance, granted plaintiffs' motion for summary disposition, and enjoined defendants from interfering with plaintiffs' rights.

Defendants argue that the trial court erred in granting plaintiffs' motion for summary disposition because the easement violated a local ordinance at the time of its creation. We disagree. Our review of the trial court's order of summary disposition regarding the validity of the easement is de novo. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). "Land that includes or is bounded by a natural watercourse is defined as riparian." *Id.* However, riparian rights may exist without actual

contact with the water. *Id.* An easement which authorizes a right of way for access to water for "back lot" owners of property creates riparian rights despite the lack of contact with the water. *Id.*

In the present case, plaintiffs preserved their riparian rights to the water by creating an easement over the north ten feet of lot 57 of defendants' property. At the time of the creation of the easement, the following ordinance was in effect:

> SECTION 16.30. RIPARIAN ACCESES [SIC]. Any development in any Zoning District which shares a common family dwelling to the use of each thirty (30) feet of lake frontage. Such common lake frontage area shall be measured along the water's edge of the normal high limit in the number of users of the lake frontage to preserve the quality of the waters and to preserve the quality of recreational use of all lakes within the Township. This restriction shall apply to any parcel of land, regardless of whether access to the lake shall be gained by eaement [sic], lease, or fee ownership.

We interpret ordinances in accordance with the rules of statutory interpretation. *Ahearn v Bloomfield Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999). If statutory language is clear and unambiguous, additional judicial construction is neither necessary nor permitted, and the language must be applied as written. *Id.* The primary goal of statutory interpretation is to give effect to the intent of the legislative body. *Ballman v Borges*, 226 Mich App 166, 168; 572 NW2d 47 (1997). We may refer to dictionary definitions when appropriate to ascertain the precise meaning of a particular term. *Id.* Furthermore, we may depart from a strict literal interpretation of a statute which is inconsistent with the purposes and policies underlying the provision and would lead to absurd and unjust results. *Albright v Portage*, 188 Mich App 342, 350; 470 NW2d 657 (1991).

We review the lower court's interpretation of an ordinance de novo. *Ballman, supra.* In the present case, the trial court held that the ordinance did not apply to the disputed easement. We agree. The ordinance, as written, addresses a "development" which "shares a common family dwelling." The ordinance proceeds to reference thirty feet of lake frontage, but there is no correlation between the development and common family dwelling language to the footage restriction on lake frontage. Accordingly, the ordinance cannot be applied as written. *Ahearn, supra.* Defendants contend that the ordinance provides that a minimum of thirty feet of lake frontage access is required, and plaintiff's reservation of only ten feet in its easement fails to meet this requirement. It appears that the purpose of the ordinance is to limit the "number of users of the lake frontage" which in turn, preserves recreational rights for riparian users. That is, it limits the number of developments and common family dwellings which may access, in this case, each thirty feet of lake *frontage*. It was not designed to require that all right of ways and easements which access the lake be a minimum of thirty feet. There is no correlation between the footage comprising an easement and the number of lake users. The ordinance was designed, not to regulate the size of access right of ways to the lake, but rather, minimize the number of ultimate users upon their arrival at the lake. Indeed, a thirty foot easement could unduly restrict a single family dwellings access to use of its property, causing a challenge to the riparian use of others. Requiring all easements and right of ways to the lake to be a minimum of thirty feet would lead to absurd and unjust results. *Albright, supra.* Accordingly, the trial court did not err in granting plaintiffs' motion for summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

EXHIBIT H

STATE OF MICHIGAN

COURT OF APPEALS

NORMAN L. WOOLLEY, RUTH D. WOOLLEY and SILAS W. DENNY,

Plaintiff-Appellees,

v

JOHN E. BAIER and JANE P. BAIER,

Defendant-Appellants.

UNPUBLISHED
June 18, 1999

No. 210262
Cheboygan Circuit Court
LC No. 94-004028 CH

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal by right from the trial court's injunctive order, issued on remand, revising an earlier injunction that had been vacated by this Court in *Wooley v Baier*, unpublished memorandum opinion of the Court of Appeals, issued October 3, 1997 (Docket No. 194346). We affirm.

Plaintiffs, as owners of boating, bathing and recreational easements over waterfront property, the fee of which is owned by defendants, sought and were granted an injunction by the circuit court on March 12, 1996, which precluded defendants' use of the subject property for camping. In that order, the court found that "the grantor of the easements did not use the property in question for any purposes whatsoever for more than twenty years after the grants" and that the intent of the original parties was that plaintiffs, as owners of their easements, would be "entitled to the unobstructed use of the property in question in common with others, for recreational and/or swimming and boating purposes." The court enjoined defendants from erecting tents or other temporary or permanent structures on the property, parking campers or other vehicles on the property, and interfering in any other way with the uses granted to plaintiffs in their easements.

On appeal by defendants, this Court vacated the injunctive order issued by the trial court and remanded to the circuit court "for revision of the injunction to more equitably balance the conflicting rights of the parties, leaving each side reasonable scope for exercise of their respective rights without interference by the other." *Wooley, supra.*

In its February 20, 1998 opinion and order issued on remand, the circuit court specifically determined the scope of plaintiffs' easements as follows:

> Over the years since the easement was granted, Plaintiffs, or their predecessors in interest, have used the subject parcel for the following purposes: ingress, egress, parking of a car, camping, launching or landing of a boat, swimming, sunbathing, fishing, picnics, to maintain a boat dock or anchorage, to play volleyball, to snowmobile or for ice skating. Thus, the parties have defined the scope of this "boating, bathing and recreational easement" by their past conduct. That definition is hereby adopted by the Court.

Defendants argue that the order entered on remand grants plaintiffs more rights to use the property than those to which plaintiffs are entitled under their easements. We disagree and hold that the court did not clearly err in its determination of the scope of plaintiffs' rights of use under their easements.

The rights of the easement holder "must be measured and defined by the purpose and character of the easement." *Unverzagt v Miller*, 306 Mich 260, 265; 210 NW2d 849 (1943); *Thies v Howland*, 424 Mich 282, 297; 380 NW2d 463 (1985). The easement cannot be modified unilaterally by either party, *Schadewald v Brulé*, 225 Mich App 26, 36; 570 NW2d 788 (1997), and the subject property, as the servient estate, is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement. *Barbaresos v Casaszar*, 325 Mich 1, 8; 37 NW2d 689 (1949). As the easement holders, plaintiffs' activities must be within the scope of the easement and cannot unreasonably interfere with defendants' use and enjoyment of their property. *Thies, supra* at 289; *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). However, "the rights of the owner[s] of the easement are paramount, to the extent of the grant, to those of the owner[s] of the soil." *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891); *Lakeside Associates v Toski Sands*, 131 Mich App 292, 300; 346 NW2d 92 (1983).

In this case, plaintiffs' easements were conveyed by deed. The scope of the terms "bathing and boating" and "recreational purposes" is somewhat ambiguous. When the wording of the grant "is uncertain or ambiguous, the circumstances surrounding the grant . . . and the situation of the parties must be inquired into with a view of arriving at the intention of the parties." *Harvey, supra* at 321. See also *Hasselbring v Koepke*, 263 Mich 466, 477-478; 248 NW 869; 93 ALR 1170 (1933), and 25 Am Jur 2d, Easements and Licenses, § 84, pp 654-655. The extent of the parties' respective rights under the easements was a question of fact to be determined by the court. *Harvey, supra* at 322-323; *Dobie, supra.* While the trial court's findings of fact are reviewed for clear error, *id.*, its dispositional ruling is subject to our de novo review. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

Here, by interpreting the terms of the easement with reference to the parties' past conduct, the trial court properly defined the scope of plaintiffs' easements. See *Cantieny v Friebe*, 341 Mich 143, 147; 67 NW2d 102 (1954) [wherein the Court looked to the parties' conduct and use of the easement for the past twenty years as evidence of the parties' intent and understanding regarding the easement holder's rights under the easement], and *Dobie, supra* at 541 [where the court looked to the "traditional and historical" uses of the subject property by the easement

holders to determine the scope of their easement]. See also Restatement Property, § 483(d), p 3019, and 25 Am Jur 2d, *supra*, § 83, p 653. There was ample testimony in this case regarding plaintiffs' uses of the easement property over many years to support the trial court's findings regarding the scope of plaintiffs' rights of use under their easements.

Although defendants assert that plaintiffs should not be allowed to park or turn their cars around on the subject property and should not be allowed to permanently anchor boats or maintain docks, defendants raise this claim for the first time on appeal. This was never an issue at trial. Nor were there facts developed below which showed that there was a material increase in the burden upon the subject property beyond that contemplated. To the contrary, defendants maintained that they never attempted to prohibit plaintiffs from having docks or boats on the lakeside property during the warm weather months and never complained about plaintiffs' vehicles on the property. To the extent that defendants did not take action at an early date to limit these or any of the other activities in which plaintiffs have engaged for over twenty years involving use of their easements, defendants' claims in this regard are barred by laches. *Myer v Franklin Hotel*, 354 Mich 552, 560; 93 NW2d 224 (1958). We note, nonetheless, that where use of the property for "boating" purposes is within the express scope of the easement and where the subject property is a relatively large parcel of property, plaintiffs have a right to maintain docks and permanently anchor their boats. See *Dobie, supra*, 227 Mich App at 539-540; *Cabal v Kent Co Rd Comm*, 72 Mich App 532; 250 NW2d 121 (1976). Cf. *Thies, supra*, 424 Mich at 289, 296-297, and *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1957) [easement holders enjoined from maintaining docks or anchoring boats in lake where their easement rights consisted of access to the lake over mere ten-foot-wide and twelve-foot-wide easements along the lake]. Moreover, the instant easements are not simply easements in a beach, as in *Fischer v Wing*, 293 Mich 61; 291 NW 222 (1940), wherein parking of vehicles was enjoined.

Defendants additionally claim that plaintiff Denny's "bathing and boating" easement should encompass fewer permissible uses than the Wooley plaintiffs' "recreational purposes" easement. The trial court, in its original order, referred to the easements as one, "for recreational and/or boating and swimming purposes," implicitly declining to distinguish between the wording of the two easements. The trial court's construction of the two easements as one was not clear error. The easements are found in deeds that may be traced to the same grantors, defendants' grandparents. It is reasonable to interpret the grantors' intent as being the same when they deeded the smaller parcels with easement rights to the same tract of land. Testimony revealed that all the easement holders used the easement property in approximately the same way.

Defendants' final claims, that the court's order does not sufficiently detail the restrained acts and unreasonably limits defendants' use of their property, are without merit.

In its injunctive order, the circuit court was required to describe in reasonable detail the acts restrained. MCR 3.310(C)(3). The circuit court's injunctive order dated February 20, 1998 specifically sets forth plaintiffs' permitted activities pursuant to their easements. In holding that defendants "may make any use of the subject lakefront parcel in common with easement holders so long as it does not interfere with or preclude Plaintiffs' described uses as specifically noted[,]" the circuit court properly determined that defendants are entitled to make *any* reasonable use of the premises that does not preclude or interfere with plaintiffs' uses as specifically delineated in

the injunctive order. See *Harvey, supra,* 85 Mich at 322. Thus, with reference to the provisions of the injunctive order, defendants are able to ascertain the acts restrained so that they may comply with the order.

We also conclude that the order does not unreasonably limit defendants' use of their property. The order reflects that defendants, as the "owner of the fee subject to an easement[,] may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement." *Id.;* Restatement Property, § 481, p 3007, § 486, p 3027. The court thus properly balanced the rights of the parties and left each side reasonable scope for exercise of their respective rights, subject only to noninterference with the other parties' rights of beneficial use and enjoyment of the property. The court's holding was in accord with the law and with this Court's instructions on remand to the court.

We affirm.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald